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IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

No. 914\

UNITED STATES OF AMERICA, *Appellant*

v.

FIRST CITY NATIONAL BANK OF HOUSTON, SOUTHERN
NATIONAL BANK OF HOUSTON, AND WILLIAM B.
CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

No. 972

UNITED STATES OF AMERICA, *Appellant*

v.

PROVIDENT NATIONAL BANK, CENTRAL-PENN NATIONAL
BANK OF PHILADELPHIA, AND WILLIAM B. CAMP,
COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE COMPTROLLER OF THE CURRENCY

OPINIONS BELOW

The opinions of the district courts are not reported.
The opinions of the court in *United States v. Provident
National Bank, et al.* are attached hereto as Ap-
pendix H.

QUESTIONS PRESENTED

Although the questions presented by the Department of Justice in both *United States v. First City National Bank of Houston, et al.* (No. 914) and *United States v. Provident National Bank, et al.*, (No. 972) are identical, each case is in a different procedural posture and the issues raised in the lower courts differ. However, for the convenience of this Court a combined brief is submitted. These differences will receive further consideration during oral argument.

STATEMENT**No. 914**

First City National Bank of Houston (hereinafter First City) and Southern National Bank of Houston (hereinafter Southern), pursuant to the Bank Merger Act of 1966, 12 U.S.C. § 1828(c) (hereinafter BMA-66), filed an application with the Comptroller of the Currency of the United States (hereinafter the Comptroller) for permission to merge. In accordance with BMA-66, the Comptroller considered the extensive evidence of First City and Southern in support of their application, requested and considered opinions of the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Department of Justice, made findings and approved the merger on September 20, 1966.

The Department of Justice filed a complaint on October 19, 1966, in the federal district court alleging that this merger violated Section 7 of the Clayton Act.

The Comptroller intervened as a party in this action on October 26, 1966, and the same day moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Defendant banks filed

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a motion on November 1, 1966, for dissolution of the statutory stay. After a hearing was held on both motions on December 2, 1966, the district court ruled the motion of the intervenor to dismiss should be granted with leave of the plaintiff to amend its complaint within ten (10) days and also granted defendants' motion for dissolution of the statutory stay.

The Department of Justice declined to amend on December 19, 1966, and the court's order dismissing the complaint and dissolving the stay became effective. The district court entered a temporary injunction, effective until December 22, 1966, while the Department of Justice filed an application for a further stay with this Court. Said application was argued before Justice William J. Brennan, Jr., on December 28, 1966, and on January 16, 1967, this Court granted the requested stay and also noted probable jurisdiction.

No. 972

On December 6, 1965, Provident National Bank (hereinafter Provident) and Central-Penn National Bank, (hereinafter Central-Penn) pursuant to the Bank Merger Act of 1960, 12 U.S.C. § 1828(c), filed an application with the Comptroller for permission to merge. This was granted on March 4, 1966, under the standards of BMA-66. Following said standards of BMA-66, the Comptroller issued an opinion on March 31, 1966, explaining and justifying his decision under the standards of the new Bank Merger Act. This opinion was rendered after careful consideration of: extensive material submitted by the banks in support of the application to merge; opinions requested and received from the Federal Reserve Board and the Department of Justice, Antitrust Division; receipt of re-

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ports of bank examiners who conducted detailed examinations of each of the banks; and, the reports of the Regional Comptroller of the Currency.

The Department of Justice filed suit on April 1, 1966, alleging a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, only. No reference was made at all to BMA-66. On April 10, 1966, the Comptroller intervened. On August 11, 1966, the Comptroller moved to dismiss the Complaint on the ground that plaintiff had failed to state a claim upon which relief could be granted. Defendant banks also filed a motion to dismiss on August 22, 1966.

After filing of briefs and argument the District Court ruled that it did not sustain the position of the Department of Justice that it was entitled to sue under the court's standards of Section 7 of the Clayton Act. However, under the court's concept of notice pleading, it needed only to take judicial notice of the relevant statute (BMA-66), and federal acts are a proper subject for judicial notice. Therefore, in effect, the court amended the Complaint to charge a violation of the standards of BMA-66, instead of the standards enunciated in Section 7 of the Clayton Act. The Court also stated, in its opinion, that it was not necessary at that time to reach the question of who had the burden of proof under BMA-66. It thereupon denied the motions to dismiss.

On November 4, 1966, following the receipt of briefs and argument, Judge Clary ruled on the burden of proof question holding that since plaintiff's only action lay within the ambit of BMA-66, the logic of that holding allows only one solution:

Justice must prove a violation of BMA-66, Section 5(B). To show this violation, Justice has to

prima facie establish (1) that there are anticompetitive effects, as defined in Section 5(B) and (2) that these anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Only such a showing will make out a case for violation of BMA-66. Proof of anticompetitive effects solely is no longer controlling. A merger may be anticompetitive and yet be legal because it promotes the public interest as set forth in the Act. Therefore, for Justice to show illegality, it must prove first that a merger is not only anticompetitive, but also prima facie that it is not in the public interest.

If and when Justice establishes such a prima facie violation of BMA-66, the burden of producing evidence will shift to the Banks and the Comptroller to counter the Justice Department's proof.

Once the Banks and the Comptroller have presented their case, Justice will be given an opportunity to rebut such matters as are raised by the Banks and the Comptroller in regard to the convenience and needs test. In any event, however, Justice has the overall burden of persuasion to show the illegality of the merger.

Subsequent to the Court's ruling on the burden of proof, plaintiff filed a summary of evidence and statement of position in which it refused to accept the burden placed on it of proving a violation of the standards set out in BMA-66.

After receipt of plaintiff's statement of position, motions for final judgment were made by defendant banks and the Comptroller. A hearing on said motions was held on December 12, 1966, and on December 29, 1966, Judge Clary handed down his opinion dismissing the

complaint with prejudice and ordered the stay to be lifted not earlier than January 18, 1967.

The Department of Justice filed an application for stay, pending this appeal, which was granted by Mr. Justice Brennan on January 16, 1967.

In each of these cases, Justice was given an opportunity to amend its pleading and in each instance it rejected the offer. A similar opportunity was given to Justice by Chief Judge Harper in the case of *United States v. Mercantile Trust Co.*¹ upon his dismissal of that suit upon substantially the same grounds. It was also rejected.

SUMMARY OF ARGUMENT

While BMA-66 provides that the validity of any proposed merger attacked by the Department of Justice after approval by the bank regulatory agency is to be tested by the Court under "the substantive rule of law set forth in . . . this Act,"² i.e., "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5),"³ which reads:

(5) The responsible agency shall not approve—

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anti-

¹ *United States v. Mercantile Trust Company, et al.* (E.D. Mo., Dec. 19, 1966). See Appendix G.

² 12 U.S.C. 1828(c), Sec. 2(c), as amended. The text of this statute (Bank Merger Act of 1966) is recited in Appendix D.

³ *Id.*, Paragraph 7(B).

competitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.⁴

and although Congress intended that the Act "would establish a single set of standards for the consideration of future mergers by the banking supervisory agencies, the Department of Justice and the courts",⁵ the position taken by the Antitrust Division was that:

Section 7 of the Clayton Act is still applicable to bank mergers; it has not been replaced or repealed by the Bank Merger Act of 1966, and plaintiff is not required to plead or prove a violation of the Bank Merger Act.⁶

Thus Justice concedes no "substantive rule of law" to BMA-66. Rather it urges that BMA-66 is a legislative recognition of the broader banking horizons of the failing company doctrine which this Court acknowledged in *Philadelphia National Bank*.⁷ Since the failing company doctrine is a matter of defense, it reasons that convenience and needs is therefore a defensive matter.

The initial question for resolution on this appeal is whether and what case the Department of Justice must

⁴ *Id.* (5).

⁵ House Committee Report accompanying H.R. 12173 (BMA-66) 89th Congress, 2nd Session, Rpt. #1221, p. 1 (1/24/66).

⁶ Page 7, brief in opposition to the motion to dismiss in *Houston*.

⁷ *United States v. Philadelphia National Bank, et al.*, 374 U.S. 321, 372.

plead and prove⁸ under BMA-66. But in order that it may fairly assess the scope of this responsibility, Justice must be apprised of the nature and character of a putative court's "review *de novo*" of a decision of the responsible bank regulatory agency.

The courts below have been unanimous that Justice is required to plead and prove a violation of the substantive standards of BMA-66.⁹ All who have considered the question have restricted the judicial function in reviewing the decision of the responsible bank supervisory agency to a traditional review of the findings of a regulatory agency. The three-judge court in *Crocker* (*supra*) felt that the judicial function was to determine whether the decision of the regulatory agency was supported by substantial evidence, and in this it was confirmed by the opinion of Chief Judge Miller in *Nashville* (*supra*). Chief Judge Clary, in *Provident*, agreed with this position in cases where the agency had held a hearing. Lacking such a hearing, he felt that the judicial function was to inquire into the facts to determine whether the agency's decision was

⁸ To suggest that the only question that need be resolved now is whether Justice must plead a violation of BMA-66—reserving the question of the burden of proof—would render the entire appeal sterile and an exercise in formal pleading. All of the rest of the issues would remain unresolved in this and in the companion cases.

⁹ *United States v. Crocker-Anglo National Bank*, 1966 Trade Reg. Rep. Par. 71898 (D.C. Cal.), Appendix E to this memorandum; *United States v. First National Bank of Hawaii*, Civ. No. 2540, D. Hawaii, 1966 (Oral Opinion of October 31, 1966, Transcript pp. 91-94; *United States v. Mercantile Trust Company* (E.D. Mo., Dec. 19, 1966), Appendix G to this memorandum; *United States v. Provident National Bank*, 1966 Trade Reg. Rep. Par. 71931 (E.D. Pa.), Appendix H to this memorandum; and *United States v. Third National Bank of Nashville*, 1966 Trade Reg. Rep. Par. 71934 (M.D. Tenn.), Appendix F to this memorandum.

fairly within its discretion. In that event he would consider the decision binding—absent evidence that the discretion had been arbitrarily or capriciously abused. This opinion adopted as precedent a recent decision of the Fourth Circuit in a branching case.¹⁰

We think the positions taken below are sound. Thus, we believe that this Court should confirm the general agreement of the lower courts and resolve the slight anomaly regarding the form of judicial review.

The position taken by the Department of Justice plainly indicates an expectation that these cases will comprise an “instant replay” of this Court’s decision in the *Philadelphia Bank* case, where it ruled that the Bank Merger Act of 1960 did not repeal by implication the antitrust laws. In that case, this Court pointed out certain procedural difficulties which it apparently felt would have raised questions of due process had that interpretation been adopted.¹¹ But those procedural difficulties have been largely resolved by the different terms of this statute. The bank regulatory agencies are charged with the application of specific antitrust concepts in a quantified context. The statute specifically provides that the courts are to review and the decision is based upon findings made and published upon a substantial record to which the Department of Justice is made privy. Under these circumstances, this Court has postulated a limited judicial role as a standard.¹²

By this statute, the Congress has expressed its will that the bank regulatory agencies, in the first instance,

¹⁰ *First National Bank of Smithfield, North Carolina v. Saxon*, 352 F. 2d 267 (October 21, 1965).

¹¹ See discussion of this point at pp. 29-32, *infra*.

¹² *Atlantic Refining Co. v. FTC* (1965), 381 U.S. 357.

are to balance antitrust and banking factors in weighing the desirability of a merger. Unless Justice is to argue—as it has not—that the bank supervisory agencies are incapable of fairly evaluating these competitive factors (as they apply in banking), then bringing these cases under Clayton 7 is nothing more than an attempt to substitute the judgment of that Department for that of the bank regulatory agencies. We submit that the statutory scheme of BMA-66 accords with the procedural requirements set down by this court in *Philadelphia Bank* and, therefore, comes squarely under the rule of *Atlantic Refining, supra*.

Where the Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation, our function is limited to determining whether the Commission's decision "has 'warrant in the record' and a reasonable basis in law."¹³

ARGUMENT

I. LEGISLATIVE HISTORY

THE BANK MERGER ACT OF 1966 WAS SPONSORED AND ENACTED DESPITE THE OPPOSITION OF THE CHAIRMAN OF THE HOUSE BANKING AND CURRENCY COMMITTEE AND THE SEVERAL REPRESENTATIVES WHO ARE USED AS THE SOLE AUTHORITIES IN SUPPORT OF JUSTICE'S INTERPRETATION OF THE STATUTE.

In interpreting the meaning of BMA-66 in these cases, appellant has urged the Courts to listen only to the words of Representative Patman, characterized as one of "the Congressmen primarily responsible for the bill,"¹⁴ Representative Reuss, "one of the principal

¹³ *Id.* at p. 367.

¹⁴ Jurisdictional Statement, p. 10, Fn. 5.

framers of the . . . Act"¹⁵ and, strangely, to the advice of those few legislators who opposed the bill to the bitter end.

On the other hand, Circuit Judge Pope, speaking for the three-judge court in *Crocker*, rejected these "authorities":

Counsel have largely confined their quotations to those from Congressmen Weltner and Todd, who opposed the bill, and from Congressman Patman who bitterly fought the legislation and finally, through a face-saving compromise, introduced the bill, while stating that if he alone were writing the bill, he "would be against it as a matter of principle." (Cong. Rec. Feb. 8, 1966, p. 2357). Counsel's choice of makers of remarks is not very persuasive.¹⁶

An examination of the legislative history sustains the position taken by the Court in *Crocker*. Indeed, the proposition that Congressmen Patman and Reuss are in any way responsible for the enactment of the legislation or participated in any substantial way in its drafting so far transcends the implausible as to merit the characterization of fanciful.

The initial bill, S. 1698, was introduced by Senator Robertson on April 5, 1965. It would have made the bank regulatory agencies sole arbiters of the propriety of any bank merger, and would have immunized any merger consummated before May 13, 1960. S. 1698 was amended (by motion of Senator Proxmire) on

¹⁵ *Id.* "One of the bill's principal draftsmen", brief p. 23; "who drafted many of the Act's key provisions", *id.*, p. 35 "who drafted this part of the Act", *id.*, p. 49.

¹⁶ Slip Opinion, p. 9.

June 8, 1965, to require submission of proposed mergers to Justice. That agency was instructed to institute suit under the Sherman or Clayton Act within thirty days of receipt of notice or be barred from future prosecution under *any* antitrust law. An injunction would automatically attach, removable only after termination of suit. The immunization of prior mergers was advanced to encompass all those which preceded the prospective date of enactment of the legislation.

As amended, the bill passed the Senate by voice vote on June 11, 1965. On June 14, the bill was referred to the House Committee on Banking and Currency. The Chairman, Representative Patman, referred it to the Subcommittee on Domestic Finance, where it remained quiescent until it was resurrected on July 19 by a letter from 26 of the 33 full committee members demanding that hearings be held. Thereafter, the subcommittee held occasional hearings into the early fall. In the interim, Congressman Ashley, who had taken the lead in pushing the proposal through the committee, had on September 13, 1965, introduced H.R. 11011.

H.R. 11011 proposed that the regulatory agencies should hold full-scale, formal hearings on each merger application. Should Justice object to a given approved merger, the decision of the supervisory agency could be reviewed by a court of appeals—a plan patterned on the practice of—inter alia—the Federal Trade Commission. In commenting on this proposal in his letter of September 24, 1965, to Chairman Patman, the Attorney General observed:

I am opposed to particular procedures set forth in H.R. 11011. The bill provides for review in a court of appeals on the basis of a "record" upon

which the order complained of was entered, and further provides that on review the findings of the agency as to the facts, if supported by substantial evidence, shall be conclusive. This type of review is normally used for determinations by such agencies as the Federal Power Commission and the Federal Trade Commission who, pursuant to the Administrative Procedure Act, have held full public adversary hearings on a public record, with full opportunities to all parties to develop evidence as to rebut evidence produced by the others. No such procedures for the full development of a record are provided for by the Bank Merger Act or by any current proposal, and indeed there are important considerations that make the more summary handling of merger applications particularly appropriate. *Since the vast majority of applications raise no serious problems of an antitrust nature, there would seem to be little point in subjecting all merger applications before the regulatory authorities to all of the requirements of the Administrative Procedure Act in order to lay the groundwork for court review in those few instances where serious questions of competition are presented.*

Consequently, while I am sympathetic to efforts to clarify through legislation the application of antitrust law to banks, I believe that the current practice, whereby the Department of Justice institutes proceedings in Federal district courts against mergers which it believes to be unlawful, should be allowed to continue; so that there could be a trial de novo of all issues in any such suit.

In summary, I am not opposed to legislation which would clarify the application of antitrust law to banks and am sympathetic to provisions which would remove some of the fears presently held by the banking industry with respect to retroactive application of section 1 of the Sherman Act

or section 7 of the Clayton Act. Nor would the Department be opposed to explicitly providing that the factors taken into account by the banking agencies under the Bank Merger Act of 1960 would also be taken into account by the courts—the proposition which underlies H.R. 11011. We believe all such factors should be taken into account in determining whether the merger is desired to be in the public interest. We believe it important to keep in mind that both regulation and competition have a role to play in seeing to it that banking institutions serve the high and especial public interest for which they are designed.¹⁷ (Emphasis Supplied)

The last two quoted paragraphs represented an important change in position by the Attorney General, who had previously expressed his total objection to any bank merger legislation. Although communication of this letter to the Committee was delayed, its existence and contents became known. Further parliamentary maneuvers by Representative Patman occasioned a blistering letter from Representative Ashley to the Chairman alleging them to have the effect of frustrating Committee action. The letter, dated 10/15/65, concluded:

This is the sorry story, step by step, that has made a mockery of sincere efforts to develop responsible legislation relative to bank mergers. Since the Senate bill was referred to your Committee on June 11, a majority of the Committee has been obliged to insist upon each and every legislative step that has been taken. From the time you acceded to the letter of September 29, signed by

¹⁷ Letter, Attorney General Katzenbach to Rep. Patman, 9/24/65, as reproduced in the House Report accompanying BMA-66.

19 members, requesting a special meeting for the purpose of acting upon S. 1698 as amended, you have permitted exactly 3 sessions to take place for this purpose. Time after time parliamentary procedure has been flaunted, the wishes of a majority of the committee thwarted, and every dilatory and obstructionist tactic at your command resorted to in your efforts to prevent the Committee from exercising its will on bank merger legislation prior to the adjournment of Congress.¹³

As the italicized portions of the Katzenbach letter indicate, the heart of his objection to full scale hearings on every application was his contention that "a more summary handling of merger applications" at the agencies would be more economical. Representative Ashley, with the help of Representative Ottinger, then reworked H.R. 11011 to include a recognition of this and other objections which had been raised by interested parties.

The Committee majority was still unable to obtain a call by the Chairman for a meeting to conclude action on the various proposals. Backed by a majority of the Committee, Representative Ashley arranged for a Committee session on October 19 to which the Chairman was not invited. When members of the Committee staff learned of the meeting in progress "in the darkened chamber" they notified Representative Patman who was not present at the time, but who ordered the meeting disbanded. The dissidents remained. Representative Reuss then entered the Committee room and attempted to rule the session out of order as not in accord with the Chairman's instructions. The dissi-

¹³ This letter is attached as exhibit A to this memorandum.

dents overruled the motion and voted out the Ashley bill 17-1.¹⁹

A distinct majority of the Committee had reported out a bill in defiance of the Chairman. While questions might be raised about the legality of their conduct, quite plainly the majority of the Committee was in full revolt with a bill before the whole House. To raise questions regarding the legality of the session at which the bill was voted out would throw open for public view the whole struggle. Besides, the majority of the House might side with the majority of the Committee. It would appear that the opposition forces decided that discretion was the better part of valor.

Accordingly, on the next day, Representative Reuss proposed a substitute measure in a letter to the Department of Justice.²⁰ As to the critical Section 5 he noted:

2. The Reuss proposal (in other sections identical with the Ashley-Ottinger proposal):

"The responsible agency shall not approve any proposed merger transaction—

"(A) unless it finds that such transaction would not involve a violation of section 2 of the Sherman Antitrust Act (15 U.S.C. 2).

¹⁹ Representative Patman's position on the legality of the Committee's action is contained in a press release including a staff report of the incident. This is enclosed as Appendix B. Representative Ashley's version is contained in the Congressional Record for October 22. This is enclosed as Appendix C.

²⁰ Letter, Representative Reuss to Attorney General Katzenbach, 10/20/65, as reproduced in the House Report accompanying BMA-66. Fn. 5, *supra*.

"(B) which would violate section 1 of the Sherman Antitrust Act (15 U.S.C. 1) or section 7 of the Clayton Act (15 U.S.C. 18) unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

The Attorney General's reply of January 5 stated: "confirming oral discussion between you and my staff. . . . Your letter and your subsequent assistance were very helpful to us in our further consideration." The Attorney General then proposed a redraft of Sections 5 and 7 of the Ashley Bill.²¹ Representative Reuss wrote Representative Patman on the following day "I intend, therefore, to urge its [Justice's proposal] adoption as a substitute for sections 5 and 7 of the Ashley-Ottinger bill, retaining the other portions of the Ashley-Ottinger bill."

Nor was this the end of the efforts of Representatives Patman and Reuss to stop passage of a bill. At the final sessions of the Committee, Representative Patman accepted 7 separate motions to adjourn, the net effect of which would have been to preclude any bank merger legislation from floor consideration. On each of these votes he was joined by Representative Reuss.

In summary then, on the question of the roles which were played by various members of the Congress, we see that it was not until after a majority of the House Banking and Currency Committee, in an allegedly "rump" session, had voted to approve an Ashley bill and this action had been indirectly confirmed by the entire committee in parliamentary maneuvering, that

²¹ As reproduced in the House Report accompanying BMA-66.

Representative Patman agreed to let *any* bill come out of the Committee. In submitting the bill which bears his name and which became the Bank Merger Act of 1966, he reported to the Congress:

Mr. Chairman, if I alone were writing this legislation and proposing it, I certainly would not propose it as it is before us. I would be against it as a matter of principle.²²

We think it would reflect no discredit upon Representative Patman if the Court, recognizing the limitations of human nature, were to view his interpretations of this statute with a jaundiced eye. He opposed the bill, "in principle" and with all his legendary vigor. What would be more natural than for him to attempt to shave its impact as much as possible when it reached the floor of the House?

Representative Reuss lent considerable assistance to Representative Patman, and when a bill of some sort became inevitable, he worked closely with the Department of Justice to modify the language of Congressman Ashley's bill. The principal proposed changes were not adopted. In large part in *haec verba*, and entirely in purport, the bill enacted was the Ashley Bill. Accordingly, we suggest that Mr. Reuss' comments on a bill he opposed in the first instance, and up to the day of final committee action, and with whose ultimate antagonists (Justice) he had allied himself, must be viewed in proper context.

²² Cong. Rec., 2/8/66, p. 2357. Compare with the statement of Senator Robertson when he introduced the bill in the Senate: This is a good Bill. I do not believe it is a perfect bill, but I am convinced it is workable and satisfactory . . . Cong. Rec. 2/9/66, p. 2538.

On the other hand, Senators Robertson and Proxmire had sponsored the legislation in the Senate as had Representative Ashley²³ in the House. When the House passed the amended bill, Senator Robertson quickly sponsored the House version before the Senate Banking Committee where it was approved by a 9 to 2 vote.

Since the final bill was eminently satisfactory to its original sponsors and so distasteful to Representative Patman, is it not to the "winners" that we should turn for an evaluation of the meaning of the statute?

A physical comparison of the Ashley-Ottinger bill voted out by the Committee on October 19, 1965, and the bill ultimately enacted demonstrate the origins of the ultimate bill. They are reproduced side by side as Appendix D to this brief.

It will be noted that the entire text of Ashley-Ottinger is preserved. Of the three additions to the text found in the enacted bill, one, 7(D), permitting agency intervention, was added by the Committee as a counter to the automatic injunction. It was not contained among Representative Reuss' proposals. The second, Section 3, was added by the Committee—again not among Representative Reuss' proposals—to em-

²³ In submitting H.R. 12173 to the Senate, Senator Robertson acknowledged the large role played by Representative Ashley in securing passage:

"I want to pay a special tribute to Congressman Ashley of Ohio for his work in connection with this bill. His untiring and constructive efforts have brought about virtual unanimity in the . . . House." (C.R., 2/9/66, p. 2551).

Congressman Grabowski, in the course of the debate noted: "I am proud to have been associated with my colleagues (naming Moorhead, Ashley, and Ottinger) in helping to draft this legislation." (C.R., 2/8/66, p. 2355).

phasize that even the parties to the *Philadelphia Bank* merger might reinstate their application under the new standards. The third, Representative Reuss' sole contribution to the bill, is the last sentence of paragraph 7(A). "In any such action, the court shall review *de novo* the issues presented." This sentence was proposed to him on January 5, 1966, by the Department of Justice which had in turn distilled the proposal from the conferences between the interested agencies which had taken place between the request by Representative Reuss of October 20, 1965, and a report from Secretary Fowler setting out the results of those conferences on January 3, 1966.²⁴ The heart of Representative Reuss' proposal of January 5, 1966—his last—was a rewrite of the key section 5 which would have returned the Act to about the same position as the Bank Merger Act of 1960 after the *Philadelphia Bank* decision, i.e.

Subsection (5) to read as follows: "The responsible agency shall not approve a proposed merger transaction unless it finds that such transaction will be in the public interest, taking into consideration the effect of the transaction on competition (including any tendency toward monopoly) and the importance of protecting the public against bank insolvency. In determining the effect on competition and the likelihood of insolvency, the agency shall take into account the following factors, among others:

- (A) the financial history and condition of each of the banks involved,
- (B) the adequacy of their capital structure,
- (C) their future earnings prospects,
- (D) the general character of their management, and

²⁴ See House Committee Report, *supra*.

(E) the convenience and needs of the communities to be served."

This key proposal was rejected. The practical identity of Ashley-Ottinger and the enacted bill is apparent when we note that the purposes section of the Committee Report on Ashley-Ottinger was adopted intact as the purposes section of the Committee Report on the enacted bill.²⁵ To sum up this legislative history,

²⁵

Purpose of the Bill

The purpose of the bill is to resolve the apparent conflict between the antitrust laws and the Bank Merger Act of 1960. The bill would furnish guidelines for the equitable disposition of certain cases now before the courts and it would provide an orderly procedure for the litigation of such bank mergers as the Department of Justice may desire to contest in the future.

(1) The bill would establish a single set of standards for the consideration of future mergers by the banking supervisory agencies, the Department of Justice and the courts under the antitrust laws—standards stricter than those in the Bank Merger Act, but which include both the effect of the merger on competition and the convenience and needs of the community to be served; it would postpone consummation of mergers hereafter approved for 30 days to give the Department of Justice an opportunity to enjoin them; and it would exempt mergers approved under the new standards and procedures from all provisions of the antitrust laws except the antimonopoly provisions of section 2 of the Sherman Act.

(2) It would exempt from all provisions of the antitrust laws except section 2 of the Sherman Act, mergers consummated before June 17, 1963, including the three "pre-Philadelphia" mergers now in court.

(3) It would exempt from all provisions of the antitrust laws except section 2 of the Sherman Act, mergers consummated after June 16, 1963, and before enactment of the bill, except mergers against which antitrust suits had been brought before such enactment.

(4) It would require the courts to use the new standards of the bill in all cases instituted under the antitrust laws after June 16, 1963, and before enactment, including the three "post-Philadelphia" cases now pending in court.

the bill enacted was the Ashley-Ottinger bill which Representative Patman and Reuss had opposed from start to finish. Representative Reuss' sole contribution to the bill, the single sentence "In any such action, the court shall review de novo the issues presented" originated neither with him, nor with the Department of Justice which now lays claim to it. The Department of Justice's proposal for a "trial de novo," "the current practice," had been rejected by the committee. The sentence ultimately selected was a distillation from a series of meetings held by a number of interested agencies. Its meaning is discussed elsewhere in the brief. (pp. 33-48)

II. THE BANK MERGER ACT OF 1966 EFFECTED SUBSTANTIVE CHANGES IN THE LAW GOVERNING BANK MERGERS

THE INTENT OF THE SUPPORTERS OF THE BANK MERGER ACT OF 1966 WAS TO PLACE PRIMARY RESPONSIBILITY FOR THE DETERMINATION OF THE VALIDITY OF A BANK MERGER UPON THE RESPONSIBLE BANK REGULATORY AGENCY, AND CREATED A NEW SUBSTANTIVE RULE OF LAW TO BE APPLIED IN TESTING THE LEGALITY OF SUCH MERGERS.

In *Philadelphia Bank, supra*, this Court ruled that BMA-60³⁶ was a regulatory statute which did not "repeal by implication" the substantive terms of the Clayton Act.³⁷ Justice argues that the same is true of BMA-66, and it was therefore justified in suing under the Clayton Act. In effect, it contends that BMA-66 did not change existing law.

³⁶ P.L. 86-463, 74 Stat. 129.

³⁷ *Supra*, p. 350.

Even assuming that this argument had any weight—which we deny, and which we shall disprove—we do not believe that that argument may now be raised by that agency. In a letter addressed to Representative Reuss on January 5, 1966, Attorney General Katzenbach stated his opposition to that portion of the Ashley-Ottinger bill which provided that:

a merger transaction which tends to lessen competition may be approved where the probable adverse competitive effect thereof is clearly outweighed in the public interest by the probable effect of such transaction in meeting the convenience and needs of the community to be served.

His letter then continued:

In thus permitting the single factor of "convenience and needs" to override all other considerations,²⁸ the proposal goes far beyond the desirable objective of achieving uniformity . . . and does not accord with my view that a substantive change in existing law is neither necessary nor appropriate.²⁹

The enacted bill reads in appropriate part:

(5) The responsible agency shall not approve—

B. Any . . . merger . . . whose effect may be substantially to lessen competition . . . or which in any other manner would be in restraint of trade unless it finds that the anticompetitive effects . . . are clearly outweighed in the public interest by the probable effect of the transaction in meeting the

²⁸ Compare this representation of the Attorney General with his current claim that the competitive factors predominate. (Brief, pp. 20-24).

²⁹ As reported in House Committee Report #1221, *supra*.

convenience and needs of the community to be served.

In attempting to influence the Committee considering proposed legislation, the Attorney General advised the Committee that language having the identical effect to that which was finally enacted would effect a substantive change. Now his office, through its attorneys, attempts to persuade the courts that this formal representation of his Department was without substance. We think they should not be permitted to treat their representations to the other branches of Government so cavalierly.³⁰

On its own "merits", the argument fares no better. We must first assume that the Congress engaged in heated debate for months to no purpose, in violation of logic and canons of statutory construction. We must assume that the bill's bitterest critic, Representative Patman, was "opposed in principle" to a bill without force or effect. We must assume that the plain words of the statute do not mean what they seem to say. And finally, we must assume that the flood of congressional representations during the debates that the bill *was* designed to change operative law evidenced a massive congressional delusion on what it was doing.

In introducing the legislative question, Representative Smith (Va.) said:

It boils down largely to a question of the Department of Justice, under the act, being required

³⁰ This initial representation by Justice was placed before the House while it was sitting as a Committee of the Whole considering the bill ultimately enacted. Representative Ryan quoted the above-cited portions of the Attorney General's letter and affirmed that "the bill is marred by the deficits to which the Attorney General referred." (Cong. Rec., 2/8/66, p. 2349).

to use these standards where the main consideration is the convenience and the necessity of the community. The only authority that would be left to fix standards by the Department of Justice would be the monopoly provision of the Sherman Antitrust Act.

I would hope that the bill would pass in its present form, and that we let it go to the Senate where, I am informed, the Banking and Currency Committee of the Senate will probable accept it as it is.³¹

Representative Smith (Calif.)

H. R. 12173 will:

... Establish a standard [which will] add to the traditional standard of a lessening of competition [a] concept of convenience and needs of the community served.³²

Representative Widnall (N.J.)

H. R. 12173 states the conditions under which the banking agencies may approve a merger that is opposed by the Department of Justice. Furthermore the bill gives the courts clear guidelines for weighing banking factors against competitive factors.

There are very good reasons for giving the banking agencies more of a say in merger cases than is accorded some other businesses . . . strict application of the antitrust laws [in banking] can . . . sometimes . . . have a detrimental effect on a community³³ [Emphasis supplied.]

³¹ Cong. Rec., 2/8/66, p. 2332.

³² *Id.*, p. 2333.

³³ *Id.*, p. 2335.

Representative Brock

Congress, in passing the Bank Merger Act of 1960, attempted to make its views clear that bank mergers should be weighed in terms of both banking factors and competitive factors. . . . However, the Supreme Court . . . limited its consideration to one factor alone . . . competition.

For those [mergers] consummated subsequent to the Philadelphia case, we simply provide that they shall be adjudged using the clarified standards of this bill.²⁴

Representative Ashley

The bill would require the court to use the new standards of the bill in all . . . "post-Philadelphia" cases. . . .

The Courts have repeatedly held that under the antitrust laws, the social or economic benefits of a given merger cannot even be considered. In the Philadelphia case, the Supreme Court said: [quoting the "ultimate reckoning" language]

It is a primary purpose of the bill to assure that the courts will never again dismiss as irrelevant the question of the needs of a community . . . [T]he merger must be shown to be sufficiently beneficial in meeting the convenience and needs of the community to be served that, *on balance*, it may properly be regarded as in the public interest. (Emphasis supplied.)²⁵

Representative Moorhead

In H. R. 12173 we are merely saying that first the banking authorities, and then the Attorney General, and finally the courts may approve a bank

²⁴ *Id.*, p. 2337.

²⁵ *Id.*, p. 2339.

merger "despite the foreseeable injury to competition" if "the merger would be consistent with the public interest" [quoting from *Seaboard Air Line R. Co. v. United States*, 34 L. W. 3181]³⁶

Representative Celler

While I am not particularly married to the idea and I do not like a weakening of the antitrust laws . . . I shall . . . vote for the bill. . . .³⁷

Representative Stephens

banks should be under the antitrust laws and the competition factors only if they are weighed in the light of considerations that are peculiar to banks. . . .³⁸

Representative Stanton

it was the expressed purpose and intent of Congress when it passed the Bank Merger Act in 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies, and that while the competitive effects of a proposed merger should be considered, they were not to be given a predominant position.

These standards were repudiated by the Supreme Court in the Philadelphia National Bank and the Lexington Bank cases in which the Court decided that the Justice Department had the final say in bank mergers. Contrary to the intent of Congress, the bank regulatory authorities were relegated to advising roles.

³⁶ *Id.*, p. 2341.

³⁷ *Id.*, p. 2341.

³⁸ *Id.*, p. 2343.

These provisions . . . reinstate a measure of antitrust consideration which was lacking in the Senate bill, and they provide a banking standard that may allow economic assistance to a community even though a merger tends to lessen competition in that community. It is this statutory balance that was intended in 1960. . . .

* * * *

The . . . bill . . . directs the courts to apply the banking standards as well as the competitive standards in any judicial proceeding attacking an approved merger transaction . . . it . . . gives these standards equal weight as between economic and competitive circumstances and it assures this equilibrium through the entire review procedure.³⁹

The same theme was emphasized in the Senate the following day.

Senator Proxmire

Subsection 5(b) was designed to change the law as it now stands, to allow the convenience and needs of the community to outweigh any anticompetitive effects that the merger might have.

Thus, it is a new standard. It is a clearly different standard that would apply in the case of banks.⁴⁰

Senator McIntyre

This bill will reassert the power of the Congress to set down the rules for bank mergers, and will correct what I consider to be errors which the courts have made.⁴¹

³⁹ *Id.*, p. 2343.

⁴⁰ Cong. Rec., 2/9/66, p. 2548.

⁴¹ *Id.*, p. 2549.

Senator Hart [Chairman of the Subcommittee on Antitrust of the Judiciary Committee]

the effect of the amendment added to the bill by the House is to amend the antitrust laws by providing special treatment for the banking industry. Under the House bill the banking industry will be less subject to the antitrust laws than any other segment of our economy.⁴²

Congressman Ryan was only stating the obvious when he noted in the course of the debates:

It is no secret that H.R. 12173 is before the House because of dissatisfaction with the Supreme Court's decision in *Philadelphia*. . . .⁴³

Open the record of the hearings, the reports of the committees and the debates on enactment to virtually any page and you will find *Philadelphia Bank* hotly debated.

Were this not enough, *Philadelphia Bank* itself stipulated the conditions—met here—which would have occasioned a different result.

There the Court noted that:

[While the Civil Aeronautics Board and the Federal Power Commission have] broad regulatory and remedial powers, in contrast, the banking

⁴² *Id.*, p. 2544.

⁴³ Cong. Rec., 2/8/66, p. 2348, Rep. Fino "... today's situation stems from the Supreme Court's misinterpretation of the language we are about to replace." *Id.*, p. 2339. Sen Robertson "It is not often that the Congress finds it necessary or desirable to reverse a decision of the Supreme Court. It is necessary and desirable in this instance. . . ." P. 2542. See also the quotes from Sen. McIntyre and Reps. Stanton, Brock and Ashley at pp. 26-8, *supra*.

agencies have authority neither to enforce the anti-trust laws against mergers Although the Comptroller was required to consider effect upon competition in passing upon appellees' merger application, he was not required to give this factor any particular weight; he was not even required to (and did not) hold a hearing before approving the application; and there is no specific provision for judicial review of his decision. Plainly, the range and scope of administrative powers under the Bank Merger Act [of 1960] bear little resemblance to those involved in Pan American.⁴⁴

But under the Bank Merger Act of 1966, the banking agencies *do* have specific responsibility to enforce the bank antitrust statute, the Comptroller is required to give specific weight to the competitive factor and finally there is specific provision for judicial review. In short, the procedural problems which this Court found present under BMA-60 have been cured in this new statute.

If in *Philadelphia Bank* the Court could say

Thus, this is not a case in which our "earlier decisions are part of the arch on which the new structure rests, [and] we [must] refrain from disturbing them lest we change the design that Congress fashioned."⁴⁵

it cannot now so say:

Nor does the legislative history of this act as recited herein permit a reiteration of the claim that

It is settled law that "[i]mmunity from the anti-trust laws is not lightly implied" . . . This canon

⁴⁴ *Supra*, at p. 351.

⁴⁵ *Supra* at p. 349.

of construction . . . is controlling here. For there is no indication in the legislative history to the 1950 amendment of Section 7 that Congress wished to confer a special dispensation upon the banking industry. . . .⁴⁶

That the administrative decision to be reviewed was not preceded by a hearing is not determinative of the question of the weight to be accorded that decision.⁴⁷ Title 5, Section 1009 speaks of agency action not of agency hearings. It makes appealable any "final agency action for which there is no other adequate remedy in any court." That statement encompasses a merger application approved by a bank regulatory agency, since BMA-66 recites that a "merger transaction . . . [consummated] . . . in compliance with this subsection . . . may not thereafter be attacked in any judicial proceeding . . . [as] a violation of any anti-trust laws" (except Sherman 2). Unless it sought review under BMA-66, Justice would be precluded from raising ordinary antitrust issues. The order would then make it an aggrieved party, otherwise finally judged. Thus, in *Zucker v. Baer*, D.C.N.Y. 1965, 247 F. Supp. 790, when an employee of the Veterans Administration brought an action to review and set aside the decision

⁴⁶ *Ibid.* 348.

⁴⁷ The question of administrative due process is not present in these cases since neither applicants, Justice, nor any other person has ever requested that the Comptroller hold a formal hearing. Should this Court, however, determine that lack of a hearing on these merger applications offends its concept of due process, it could remand these cases to this Office. (*U.S. v. Bianchi & Co.*, 373 U.S. 709, 718) We urge, however, that, in light of the limited occasions upon which the hearing will serve any purpose and our offer to hold hearings whenever sought by an "aggrieved party", the substantial record already developed in these applications (*supra*) accommodates the requirements of due process.

of the Regional Director of the Civil Service Commission in refusing reclassification, there was found to have been neither hearing nor even an administrative record in the usual sense of that term.

[T]he court is thus left with no way of knowing what investigation the Director made or what evidence he considered except to the extent that this is reflected in his decision. [P. 792.]

* * * * *

If plaintiff submitted relevant and persuasive evidence, as he claims he did, and this evidence was ignored by the director, as plaintiff claims it was, the director's decision might well be thought to have been arbitrary. . . . In my opinion plaintiff has raised a question of fact which should be decided only after a trial or hearing, at which testimony can be taken as to the procedure followed by the Director, as to what evidence was before him, and as to what consideration he gave to it. This is not to suggest that the court should try de novo the merits of plaintiff's claim. . . . [P. 793.]

A. MEANING AND SCOPE OF REVIEW DE NOVO

THE RECORD IS CLEAR THAT THE PHRASE "REVIEW DE NOVO" WAS SUBSTITUTED FOR THE JUSTICE DEPARTMENT'S PROPOSAL FOR A "TRIAL DE NOVO". JUDICIAL INTERPRETATIONS OF THIS TERM ARE SUBSTANTIALLY UNIFORM IN HOLDING THAT IN CONDUCTING SUCH A REVIEW, THE NORMAL STANDARDS OF JUDICIAL REVIEW OF AGENCY DECISIONS, INCLUDING THE "ARBITRARY AND CAPRICIOUS" AND THE "SUBSTANTIAL EVIDENCE" RULE SHOULD APPLY. THE LOWER COURT OPINION IN NO. 972 CLEARLY COMMANDS THE APPLICATION OF ONE OF THESE RULES; AND THE POSTURE OF THE CASE IN NO. 914 JUSTIFIES APPLICATION OF SUCH STANDARDS BY THE COURT.

Appellant contends that the term requires the court to ignore the findings of the banking agency and to assess the banking and competitive factors without reference to the agency's finding. While such a construction might be compatible with the words "de novo" alone, it is hopelessly in conflict with the concept of a "review."

A review is inevitably in the nature of re-examination of something and here the only thing which could be "reviewed" is the approval by the agency. Moreover, with specific reference to the "convenience and needs of the community to be served", serious constitutional and practical problems attend the view advocated by Justice.

In *Philadelphia*, this Honorable Court indicated grave doubts concerning the competence of courts to deal with these questions as matters of first impression.

We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial com-

petence, and in any event has been made for us already, by Congress when it enacted the amended Section 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.⁴⁸

Of course, this kind of judgment has, historically, been assigned by the Congress to the regulatory agencies. The court has had no qualms in evaluating the performance of these agencies in particular contexts, but always with the view that the agency's expertise is to be given at least presumptive and sometimes conclusive weight.⁴⁹

While a court might express some reservations concerning its competence on the question of what is a banking factor and how said factors serve the convenience and needs of the community, it would not be constrained in assessing the weight to be accorded those factors once the banking agency has set them out and explained its reasoning.

⁴⁸ *Supra*, p. 371.

⁴⁹ See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), *Board of Trade v. United States*, 314 U.S. 534 (1942), *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, *Federal Radio Commission v. Nelson Brothers*, 389 U.S. 266, in which words of a rough comparability with "convenience and needs" are used approvingly. Certainly, as Congressman Reuss pointed out when queried about the phrase, "They will require court interpretation" (C.R. 2/8/66, p. 2347) but as he pointed out—so did the broad language of the Sherman Act. "Convenience and needs" here encompass a careful evaluation of the spectrum of banking services offered or needed in the light of a community's economic development and requirements. See *Suburban Bank of Kansas City v. Jackson County State Bank*, 330 S.W. 2d 183 (Mo. 1959); *Chimney Rock National Bank of Houston v. State Bank Board*, 376 S.W.2d 595 (Tex. 1964); *Wall v. Fenner*, 76 N.W. 2d 722 (S.D. 1956).

Thus we believe that a "review *de novo*" simply means that the court will take the banking agency's findings as presumptively valid, but subject to revision should the court be convinced on its fresh examination that they are not supported by substantial evidence.

With this view, the legislative history is in accord [that is, always excepting those three Representatives who opposed the bill in the first instance, and who, when they were unable to stop its passage, attempted to accomplish much the same result in debate. On this proposition Justice—at pp. 35-6 of its brief—cites each of these Congressmen; Messrs. Patman, Reuss and Todd—the last of whom is there erroneously identified as Congressman Multer]. For example, the following exchange between Senators Javits and Hart:

Senator Javits

If the Department of Justice does its job and the courts ultimately apply this test *de novo*—in short, is it not implied clearly, from the right of regulatory agencies to go into court that the court will determine this issue, and I am sure, being influenced by what the regulatory agency decided but not being bound by it.

Senator Hart

The Senator is correct.⁵⁰

The reference by Senator Holland

[The bill] will give greater weight to the finding of the regulating agency without making that final in the event some bad mistake is made.⁵¹

⁵⁰ Congressional Record, 2/9/66, p. 2548.

⁵¹ *Id.*, p. 2550.

Representative Widnall remarked that

There are very good reasons for giving the banking agencies more of a say in merger cases than is accorded some other businesses.⁵²

Representative Smith, the then Chairman of the House Rules Committee, stated that "the only authority that would be left to fix standards by the Department of Justice would be the monopoly provision of the Sherman Antitrust Act"⁵³ but if "fixing standards" is a function of the agencies and not of Justice—and thus by derivation not of the courts—then the courts are not free to disregard the conclusion of the bank regulatory agencies.

Representative Stanton, a member of the Committee which considered the bill, quoted above at pages 27-28, characterized the action of the courts as a "review procedure." He argued that control of bank mergers should be in the hands of the banking agencies and that their opinion should not be relegated to an advisory role.

These representations are in direct conflict with the arguments of the Justice Department and are in accord with the substance of Congressional discussion on this point generally. Saving only the positions advanced by Representatives Patman, Reuss and Todd, the Congressional debates support this natural interpretation of the statute's terms.

Contrary to its Representation in the Jurisdictional Statement that it was the source of the term "review

⁵² *Id.* at page 2322.

⁵³ *Id.*, page 2349.

de novo", Justice had originally proposed that the statute should recite a "trial *de novo*" test. In his letter of September 24, 1965, to Representative Patman, Mr. Katzenbach had recommended court review of bank mergers by "trial *de novo* of all issues in any such suit."

The expression "review *de novo*" contained in the final bill was a result of the meetings among interested agencies requested by Representative Reuss on October 20, 1965. It was incorporated among Justice's proposals amendatory to the Ashley Bill on January 5, 1966.

Without any firm evidence as to the source of the term, we suggest that the attendant circumstances support the likelihood that the term "review *de novo*" was taken from the opinion of the Fourth Circuit in the *Smithfield* case.⁵⁴ It will be recalled that Mr. Katzenbach had proposed "trial *de novo*" on September 24, 1965. The Ashley-Ottinger Bill was voted out on October 19, and Representative Reuss had proposed his substitute measure on October 20. *Smithfield* was decided October 21. The meetings referred to above took place between that date and January 3, 1966.

Smithfield, dealt, *inter alia*, with the question of the weight to be given the Comptroller's opinion granting a contested branch application. The Circuit Court remanded the case to the District Court noting that

we will request the Court to review *de novo* the action of the Comptroller. (p. 273)

On the question of the difference between this phrase and the established "trial *de novo*", we believe that the

⁵⁴ *Supra*, Ftn. 10.

distinction rested on the limited nature of the appellate review which the Circuit felt that the District Court was entitled to make

If after the court has made its fact findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion. (p. 272)

This case and *Smithfield* involve different statutes. However, we need not pause to evaluate the distinctions. Clearly, the juxtaposition of events illumines the intent of Congress as to the meaning of "review *de novo*" as being something less than a clear slate and more approximating the presumptive validity Congress has traditionally accorded the judgment of a regulatory agency. The decision coming just before the adoption of identical language in legislation gives rise to the presumption in *Sutherland* that

legislative language will be interpreted on the assumption that the legislature was aware of * * * judicial decisions.⁵⁵

Thus, while we need not reach the question whether *Smithfield* should govern us here, it does establish a definition of the meaning of the phrase "review *de novo*" which we may reasonably conclude was before the eye and within the intendment of the members of the Committees concerned with banking and the Congress as a whole when it adopted the term in BMA-66.

⁵⁵ Sutherland, Statutory Construction, Section 4510, 3rd Ed., Horach.

The only earlier instance we have discovered of the use of the term "review de novo" in Federal jurisprudence is in *Choctaw Nation v. United States*, 119 U.S. 306 (1886). There, an Act of Congress of 1881 provided that the Court of Claims was authorized "to review the entire question of differences de novo . . . arising out of treaty stipulations with the Choctaw Nation." This sorry record of greed and dishonored obligations included a Treaty of 1855 effected by the Senate which made awards and adjusted claims under the most favorable circumstances to the Indians of all the treaties. It provided that all of the claims of the tribe "shall be referred to the Senate . . . for final adjudication."

The Court of Claims disregarded this settlement and the amounts still due under it because of the interpretation it placed upon the "review de novo" authorization; i.e., "the court should entirely disregard [the treaty], giving it no effect whatever." The Supreme Court reversed, holding:

There is nothing in the language to prevent the court from giving to that award effect as *prima facie* establishing the validity of the claim so far adjudged in favor of the Choctaw Nation, leaving to the representatives of the Government in this litigation the right . . . to attack it upon the merits, as a finding unsupported by proof, or unjust and unfair in view of all the circumstances, and on that account not to be enforced. In that view, so much effect only would be given to it as to cast the burden of disproving its justness and fairness upon the United States in this suit.

The similarity of this language to subsection (e) of Section 1009, Title 5 (fn. #59, p. 51 *infra*) is remarkable. Nowhere are the same words used, but the identi-

cal principles are advanced in defining the function of judicial review generally and the meaning of a "review de novo" in particular.⁵⁶ The Court in this case even reaches the additional question of the locus of proof on a "review de novo".

Should this Court view the *Choctaw Nation* case as precedent, we submit that all of the principle issues in these cases must be resolved in our favor. But whatever the precedential value of the case, its logic compels an acceptance of the position we advance here.

Lower Court Interpretations

The court in *Crocker* found that the statutory scheme provided for a review of the competitive and convenience factors found by the regulatory agency. It held

"No difficulty would be presented here so far as reviewing *de novo* the first of these determinations for this court has traditionally adjudged whether

⁵⁶ Compare also with judicial recitation of the permissible extent of judicial review. See; e.g. *U.S. v. I.C.C.*, D.C.D.C. (1963) 221 F. Supp. 584, 587 "... the scope of judicial review of final decision of administrative agencies is narrow. It is limited and restricted to determining whether the agency committed any errors of law, or transcended the legal limitations on its authority; whether there is substantial evidence to sustain its findings of fact; and whether the result reached was arbitrary or capricious." *Mississippi Valley Barge Line Co. v. U.S.*, D.C. Mo. (1966) 252 F. Supp. 162, *Sterling Davis Dairy v. Freeman*, D.C.N.J. (1965) 253 F. Supp. 80, *Cobb v. U.S.*, D.C. Ark. (1965) 240 F. Supp. 574, *Accelerated Transport-Pony Express Inc. v. U.S.*, D.C. Va. (1964) 227 F. Supp. 815 *affd.* 379 U.S. 4, *Youngblood Truck Lines Inc. v. U.S.*, D.C. N.C. (1963) 221 F. Supp. 809, *Great Northern Railroad Co. v. U.S.*, D.C. Minn. (1962) 209 F. Supp. 230, *Florida Gulfcoast Broadcasters, Inc. v. F.C.C.* (1965) 352 F2 726, *Fried v. U.S.*, D.C. N.Y. (1964) 212 F. Supp. 886, *N.L.R.B. v. Minnesota Mining and Mfg. Co.*, C.A. 8 (1950) 179 F2 323; *Flower Furniture Mfg. Co. v. Esperdy*, D.C. N.Y. (1962) 229 F. Supp. 182.

mergers have anti-competitive effects. But the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding." (p. 12)

* * * * *

"This does not mean that the administrative order of an agency or commission may not be reviewed in a judicial proceeding in a constitutional court; but such a review is necessarily limited to the determination of questions of law and the ascertainment of whether findings of fact by the agency are supported by substantial evidence." (p. 14)

* * * * *

"It is plain to us that the congressional purpose here was to provide for an initial decision by the Comptroller and that the action brought by the Department of Justice should be deemed an action to review that decision. It is noteworthy that the section of the statute which uses the term 'de novo' does not speak of a trial de novo but of a *review* de novo.

The legislative scheme here, in our view, resembles that which is more elaborately spelled out in those sections of the Interstate Commerce Act which were discussed in the recent case of *Seaboard Air Line Co. v. United States*, 382 U.S. 154." (p. 19)

* * * * *

"In holding that our function now, under the 1966 Act, is to review an appropriate order of the Comptroller, we are disapproving other alternatives. One alternative would be to hold that we must disregard any suggestion for a review

and simply decide the case on the evidence now before us, applying directly the standards set forth in Section 18(c)(5). Such, we think would not be consonant with the clear purpose and intent of the Act. Plainly the whole intent was that there should be made available in determining the validity of bank mergers the expertise of persons familiar with banking and with the operating procedures of banks. Not only is this court constitutionally without power to evaluate such features of the 'probable effect of the transaction in meeting the convenience and needs of the community to be served' but we lack the informed experience properly to apply such tests." (pp. 26-27)

In *Provident*, the court distinguished *Crocker* on the ground that no hearing had been held in the *Provident* case. Had there been a hearing, it would have found a substantial evidence rule; but without a hearing, it found that the case fell within *Smithfield*:

"The substantial evidence rule, therefore, may be invoked only when a proper foundation is laid for it as was done in *Crocker*.

Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside."

(See also slip opinion, 12/29/66, p. 5)

Chief Judge Miller, in *Nashville* specifically adopted the rationale of *Crocker* as to the scope and nature of the judicial review of the action of the regulatory agency. (P. 10, Slip Opinion).

This court—per curiam in *Seaboard Air Line Railroad Company v. United States*—382 U.S. 154 (1965) citing its previous decision in *Minneapolis & St. Louis Railroad Company v. United States* stated at pp. 156-7.

Although § 5(11) does not authorize the Commission to 'ignore' the antitrust laws, *McLean Trucking Company v. United States*, 321 U.S. 57, 80, there can be 'little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws.' 321 U.S. at 85-86. The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to 'estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and to consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy.' 321 U.S. at 87.

The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest.'

We can find no substantive difference between the circumstances there and here. We note for the Court's convenience that the analogy between that case and this is part of the legislative history of BMA-66⁵⁷

⁵⁷ Congressional Record, 2/8/66, p. 2341 (Remarks of Rep. Moorhead quoted at pp. 26-7, *supra*). Note that Rep. Moorhead was cited as one of the drafters of the legislation by Rep. Grabowski. C. R. 2/8/66, p. 2355.

and was viewed by the three-judge court in *Crocker* as a strongly analogous precedent."

Judicial review of administrative agency decisions not otherwise governed by the Administrative Procedure Act is generally governed by Title 5, Section 1009 of the United States Code." This provides that

" Slip opinion, p. 19.

" Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Any person . . . adversely affected . . . shall be entitled to judicial review.

(b) . . . form . . . any special statutory review . . . or . . . any applicable form of legal action . . . in any court of competent jurisdiction. (emphasis supplied)

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . .

Scope of Review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

the factual findings of an agency will not be overturned on review if supported by substantial evidence unless the decision was arbitrary or capricious or an abuse of discretion. Is the effect of the addition of the words "de novo" such as to change this general mandate? We think not. In the *Smithfield* decision, which we believe to be the source of the term, the appellate court instructed the District Court to make full inquiry into all the relevant facts. This we believe to be the mandate of BMA-66. Review de novo simply means that the Court's inquiry into the facts is not to be restricted to those considered by the agency.⁶⁰

The Court's refusal to apply a "substantive evidence" standard in *Smithfield* was premised upon the alleged failure of the Comptroller to make any portion of the record available to the protestant or to afford him a reasonable opportunity to be heard.⁶¹

⁶⁰ As to many particular agencies, either the terms of the statute or judicial interpretation have restricted the court's review to those facts considered by the agency. Introduction of new evidence is not allowed on review. *Walled Lake Door Co. v. U.S.*, D.C. Mich. (1962), 31 FRD 258 (ICC); *Liacakos v. Kennedy*, D.C.D.C. (1961), 195 F. Supp. 630 (deportation); *Wilson & Company v. U.S.*, C. A. Ill. (1964), 335 F.2d 788 (F.C.C.); *Denison v. Udall*, D.C. Ariz. (1965), 248 F. Supp. 942 (mine claim cancellation by Dept. of Interior.).

⁶¹ "The Court will not be held to the substantial-evidence rule, that is it will not be limited to the ascertainment of whether, on the record as a whole, there is substantial evidential and factual support for the Comptroller's action. . . . We have said the Comptroller did not act arbitrarily in not allowing a hearing. However, a necessary consequence of his unilateral procedure is that the facts on which the Comptroller presumably acted should not be given the preferred position accorded by the substantial-evidence rule. The rule would declare them indisputable if some reasonable basis for them may be found in the evidence. Applied here, the plaintiff would be bound by evidence offered in a proceeding in which it was not heard.

This consideration is not applicable in these merger cases, where the entire economic presentation of the merger-proponents and the decision of the bank supervisory agency are made available to the Department of Justice. Its opinion is solicited and carefully considered. Should it seek a hearing in any of these cases, it need but ask.

The circumstances which the court in *Smithfield* felt justified denial of the substantial evidence standard were not present in *Provident*. Thus we feel that the substantial evidence rule, as well as the arbitrary and capricious standard, are applicable to both of the cases here appealed. The Department of Justice had itself taken the position that full scale evidentiary hearings should not be held in all merger cases.

Since the vast majority of applications raise no serious problems of an antitrust nature, there would seem to be little point in subjecting all merger applications before the regulatory authorities to all of the requirements of the Administrative Procedure Act in order to lay the ground work for court review in those few instances

Hence, there is no place in the review for an opening-presumption of correctness of any fact which it may appear to the Court was adopted by the Comptroller for his decision." (Emphasis supplied) pg. 271-272

The dissent also buttresses this interpretation.

"If the Comptroller wishes to continue to use informal proceedings to deal with branch applications he must make sure that the proceedings are fair. Banks potentially affected, which desire to contest an application, should be permitted reasonable access to relevant materials and an opportunity to have their say, if only informally. I would remand the case to the District Court for its return to the Comptroller with instructions to make available to the plaintiff the requested information." (pg. 275)

where serious questions of competition are presented.⁶²

Since the statute itself (5 U.S.C. § 1009) requires no hearing; the aggrieved party (here Justice) did not feel them necessary except in a "few instances"; and the aggrieved party did not seek one in any of the cases before this court;⁶³ it would not seem that any rational basis has been established for denying the application of the statutory standard here.

Further, in construing statutes setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of that statute.⁶⁴

And if we accept Justice's proposed metamorphosis of the term into a "trial de novo," affording no recognition to the agency's determination, we violate the scheme of the general statute without any clear mandate in the specific statute.⁶⁵

⁶² Fn. 15, *supra*.

⁶³ Indeed, it refused to participate in a court-directed hearing in the *Crocker* case.

⁶⁴ *United States v. Morgan*, 307 U.S. 183, 191, (1939). *Reich v. Webb*, C.A. Cal. 1964, 336 F.2d 153, cert. denied, 380 U.S. 915.

⁶⁵ Those few instances where the agency's decision is not accorded presumptive validity are quite explicit, and are *strictly* limited to the monetary value of cash awards granted by such agencies. (A traditional judicial function) Thus, as to money awards by the National Railroad Adjustment Board, the Board's findings of fact are, by the terms of the statute, only "prima

B. A "TRIAL DE NOVO" APPROACH AS ADVOCATED BY THE DEPARTMENT OF JUSTICE WOULD REQUIRE THE COURTS TO USURP ADMINISTRATIVE AND LEGISLATIVE FUNCTIONS IN MAKING AN INDEPENDENT DETERMINATION OF THE PUBLIC INTEREST IN ANY BANK MERGER CASE; SUCH AN APPROACH POSES SERIOUS CONSTITUTIONAL QUESTIONS.

The difficulties connected with inquiry by the courts into the essentially administrative function of determining the "convenience and needs of the community to be served"⁶⁶ have already been adverted to by this court in its opinion in the *Philadelphia Bank* case:

We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence . . .⁶⁷

The constitutional issues arising out of judicial review of administrative determinations have already received considerable attention in this court. In *Keller v. Potomac Electric Co.*, 261 U.S. 428, 444 the statute provided for judicial review of administrative rate making:

The Court is, therefore, given jurisdiction to review the entire record and to make the order or decree which the Commission and the District Courts should have made.

facie" valid with a presumption similar to that accorded expert testimony and otherwise such suits "shall proceed in all respects as other civil suits." (45 U.S.C. § 153) See *Russ v. Southern Ry. Co.*; C.A. Tenn. (1964) 334 F.2d 224, cert. den. 379 U.S. 991. Similarly, see 7 U.S.C. § 499b and *John J. Trombetta Co. v. Goldstein & Procacci*, D.C. Pa., 1961, 198 F. Supp. 288 for an analogous agricultural statute.

⁶⁶ See, e.g. *Radio Comm. v. G.E. Co.*, *infra*.

⁶⁷ *Supra*, p. 371.

Such legislative or administrative jurisdiction, it is well settled cannot be conferred on this Court either directly or by appeal . . . The jurisdiction of this Court and of the inferior courts of the United States ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of evoking the advice of this Court . . . to administrative or legislative issues or controversies.

In *Radio Commission v. General Electric Company*, 281 U.S. 464, the question to be decided was whether the "public convenience and necessity" would or would not be served by renewing the existing license without change. This Court observed that it

is invested with judicial powers only and can have no jurisdiction other than of cases and controversies falling in the classes enumerated in that article [judiciary article of the Constitution]. It cannot exercise or participate in the exercise of functions which are essentially legislative or administrative. (p. 469)

. . . the proceeding . . . is not a case or controversy . . . but is an administrative proceeding and therefore that the decision therein is not reviewable by this court. (p. 470)

That this Court may review the decision of an administrative agency without interjecting itself into the administrative decision making process was noted by Mr. Justice Douglas in *Federal Power Commission v. Idaho Power Company*, 344 U.S. 17, 21.

The Court, it is true, has power "to affirm, modify, or set aside" the order of the Commission "in whole or in part" . . . But that authority is not power to exercise an essentially administrative

function . . . The nature of the determination . . . the project adopted "shall be such as in the judgment of the Commission shall be best adopted to a comprehensive plan . . . for . . . beneficial public uses." Whether that objective may be achieved if the contested conditions are stricken from the order is an administrative, not a judicial, decision.

A number of state courts have considered this constitutional question as it specifically applies to legislative directions for "trial de novo" on judicial review of administrative determinations. These cases have generally found the proposal an unconstitutional invasion of the legislative or administrative process.

Thus, in *Household Finance Corporation v. State*, 244 P.2d 260, a Washington statute provided that on appeal from a branch authorization decision of the Superintendent of Banking "a trial shall be had in . . . Court de novo." The trial court concluded that a *trial de novo*

means a new and independent trial on the law and facts from which the Superior Court shall determine whether or not in this case the license should be granted in view of all the facts and circumstances as disclosed by the evidence and the law applicable to the case.⁶⁸

That court found the proposal unconstitutional. The appellate court agreed.

It [the trial court] is also correct in its ultimate conclusion that the scope of its inquiry under

⁶⁸ As reported in the appellate opinion at p. 262. Compare with the Justice Department's proposal here that the trial court should make its examination "free of presumptions traceable to anyone" (Pretrial brief, Dept. of Justice, *U.S. v. Provident N.B. et al.*, p. 28).

this statute is limited to determining whether or not the supervisor had acted arbitrarily, capriciously or contrary to law. (p. 262)

* * * *

We are constrained to hold that the [section of the statute] which purports to vest in this . . . court . . . the right to reverse on a trial de novo a decision of the supervisor with reference to the granting of such a license and, in effect, to substitute its judgment for that of the supervisor as to whether or not a license should issue, is unconstitutional as an attempt to vest a nonjudicial power in a constitutionally created court. We must reject this expansion of the courts' power as firmly as we would resist a reduction of its rightful authority. (p. 263.)

As to the appropriateness of judicial inquiry into an administrative test not very dissimilar from "convenience and needs," the court then observed

* * * *

Appellant contended that the supervisor did not give sufficient weight to the "*convenience and advantage of the respective communities*" . . . (pp. 265, 266) Even if the court should disagree with the supervisor's findings, still the court may not substitute its judgment for that of the supervisor upon this question. From the evidence in this case we cannot find that he acted arbitrarily or capriciously in arriving at the findings upon which he based the denial of these applications. (P. 267) [Emphasis supplied.]

Rather than declare a judicial "trial de novo" unconstitutional, some courts have carefully strictured its meaning. Thus in *State Board of Medical Registration v. Scherer*, 46 N.E. 2d 602, (1943) the highest court in Indiana held:

The granting and revocation of licenses . . . is a ministerial function . . . these . . . duties may not

be delegated to courts, and that the so-called appeal provisions of statutes which undertake to vest in courts jurisdiction to try and determine *de novo* the facts . . . must be treated as merely providing procedure by which the proceeding may be brought before the court for an investigation to determine whether the ministerial body has acted legally and within its powers. (p. 603)

* * *
 . . . the only jurisdiction of the court is to review the decision of the board, and . . . the decision of the board must be sustained if it is supported by substantial evidence . . . (p. 605)

A series of Texas cases, summarized in *Jones v. Marsh*, 224 S.W. 2, 198, provide that a judicial review of administrative determinations [as to which, on "proceedings on appeal, trial shall be *de novo* under the same rules as ordinary civil cases"], shall be limited to ascertaining whether the administrative determination is supported by substantial evidence, even though, taken literally, the statute "seems to sustain the conclusion . . . that the substantial evidence rule does not apply to the trial in district court" (p. 201).

A procedure recommending itself to us here in giving content to a "review *de novo*" was adopted by a Connecticut court in ruling on the purpose and effect of a trial *de novo* on appeal from a liquor license revocation. In *DeMond v. Liquor Control Commission*, 30 A2 547 (1943), the Court first ruled that "administrative functions [can] not constitutionally be vested in the courts" (p. 548); it then proposed:

The requirement of a trial *de novo* can be given full effect within constitutional limitations. Previous to the enactment of the statute, we held that in appeals under this act as in other similar situations the question for the court to determine is

whether the commissioner acted arbitrarily, illegally or in abuse of its discretion, and that this is to be determined upon the basis of the proceedings before it, if they were available, or upon a finding of facts by the court upon the assumption that these are the facts upon which the commission acted . . . The issue is still, are there legal and reasonable grounds for its action; but the court, in reaching its decision, is not confined, as heretofore, to the facts actually or assumed to have been proven before the commission; it conducts an independent inquiry. In this sense only is the trial *de novo* . . . "upon these appeals the court hears and considers all pertinent matters for the purposes of reaching an intelligent conclusion as to the legal propriety of the action of the commissioners. In this qualified sense, but in no other, is its hearing one *de novo*."

The other addition to the statute, that the court may reverse or affirm, wholly or partly, or may modify or revise the decision of the commissioner, does not indicate a different intent. Under that provision, the court cannot, on an appeal, substitute its discretion for that vested in the liquor control commission; it can go no further than to make the decision of the commission conform to law or to a conclusion which is *the only* reasonable one upon the facts proven (emphasis supplied) . . .

As the appeal is . . . a process for invoking the power of the court to decide whether, upon the facts it finds proven, the decision of the commission is unwarranted in law or in abuse of its discretion, the amendments to the act did not change the nature of the proceeding. (p. 549)."

But we see no need to torture the statutory provision before us into a trial *de novo* mold which can only

⁶⁹ See also *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S. W. 2d 450.

raise unnecessary questions. As this court stated in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* 301 U.S. 1 at page 30:

The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute by one of which it could be unconstitutional and by the other valid, our plain duty is to adopt that which shall save the act. *Even to avoid a serious doubt, the rule is the same.* (Emphasis supplied)

If we simply treat the words "review de novo" as permitting the Court to examine all of the facts presented by the parties before deciding whether the agency was arbitrary and capricious in its determination and view the record on which the court is to determine whether there is substantial evidence to support the verdict of the administrative agency as all of the facts examined by the agency and all of the facts presented to the court, then we avoid all constitutional issues. The courts' review of a banking agency decision varies from other agency review only in that the record is not foreclosed to the parties.

C. THE TERM "CLEARLY OUTWEIGH" IS CLARIFIED IN THE LEGISLATIVE HISTORY AS MEANING ONLY A PREPONDERANCE OF THE EVIDENCE. THERE IS NO MERIT TO THE CONTENTION THAT THE EVIDENCE SUPPORTING A FINDING ON "CONVENIENCE AND NEEDS" MUST BE OVERWHELMING.

The Justice Department argues vigorously that this term means an overwhelming preponderance of facts in support of "convenience and needs" is required to overcome any anticompetitive effects.

We believe that the plain meaning of the words, without reference to any legislative history, is simply that the two criteria are to be balanced; doubt as to

which factor predominates is to be resolved in favor of the competitive factors. Should there be no doubt, even if the Court's balance be one microgram in favor of "convenience and need," then that factor should prevail. But, if Justice is right, then Congress did not mean what it said, it meant "clearly outweigh by a considerable margin" or words to that effect.

That the simple, logical meaning of the phrase was intended is substantiated by the bulk of the congressional dialogue on the bill. See, e.g., the quotations from remarks of Representatives Smith (Va.), Brock, Ashley, Moorhead, Stephens, and Stanton which are cited above.⁷⁰

Justice conceives that the Committee report, in the sentence quoted below, supports its contention that the convenience and needs factor is to be a rare "exception" to the "predominant" competitive factors. This colloquy between Representative Widnall and the author of the bill, Representative Ashley, during floor debate on the bill negates this contention and establishes the intent of the Committee that the convenience and needs and competitive factors were to be balanced as correlative terms.

Mr. Widnall:

[In] . . . the committee report, it is stated . . . "permits an exception . . . where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served—recognizing that effects outside the section of the country involved may be relevant to the capacity of the institutions to meet the convenience and needs of the community to be served—

⁷⁰ At pp. 24-9, *supra*.

that it would be in the public interest to permit it."

Would the gentleman care to comment on the precise sense in which the word "so" is used in this paragraph?

Mr. Ashley:

The word "so" is used in the sense of "in just such a degree" and relates directly to the last clause of the sentence from which the gentleman has quoted. In other words, the merger must be shown to be sufficiently beneficial in meeting the convenience and needs of the community to be served that, *on balance*, it may properly be regarded as in the public interest. (emphasis supplied) p. 2339

Senator Robertson reported the bill to the Senate as follows:

This bill . . . takes into account both the competitive factors on which the Antitrust Laws are based . . . and the convenience and needs of the public to be served by the proposed merger bill . . . to be considered along with the competitive factors, equally, neither element being controlling. p. 2538

Chairman Celler of the House Judiciary Committee discussed the question of the need for "convenience and needs" to outweigh antitrust considerations at length without ever mentioning the word "clearly" (p. 2341).

The following exchange between Congressman Stephens (a committee member) and Congressman

Ashley also establishes the underlying balancing function of the two tests:

Mr. Stephens:

The major compromise comes about in this fashion. The bill provides that the Antitrust Laws do pertain to banks, but that the banks being already regulated—the banks being different from any other kind of business—the banks should be under the Antitrust Laws and the competitive factors only if they are weighed in the light of considerations that are peculiar to banks. These factors we try to set up in the measure.

So we have compromised ideas and said that the Antitrust Laws do pertain to banks if the criteria for bank mergers are not such *as set in the bill*, but that diminution of competition in a merger is not the sole factor to be taken into consideration. (emphasis supplied)

* * *

Mr. Ashley:

Is the gentleman saying as I believe he is that it is the consensus of the committee, in drafting this bill that the public interest is to be considered as combining the consideration both of the anti-trust competitive factors of a particular merger on the one hand, and on the other, the needs and convenience of the community that may derive from that merger, which, as I say, may result in a diminution of competition; in other words, that the public interest has got to involve a consideration of both of these rather considerable factors?

Mr. Stephens:

This is correct, and that is what we attempted to put into this bill as a compromise because of the flat statement of the Court [in *Philadelphia National Bank*] concerning antitrust laws per-

taining to banks which is: If there is a diminution of competition, there shall not be a merger. You have to take into consideration, too, that when we talk about public interest, we know public interest is already taken care of in the banking industry, even if we did not have this legislation, because it is a regulated industry. The justification of a regulation is in the fact that banks affect closely the public and its interest must be protected. P. 2324

Moreover, the term "clearly outweigh" implies that the balancing must take place in a concrete context; that is, the strength which the "convenience and needs" must demonstrate will vary in precise proportion with the strength of the allegedly anticompetitive effect. The more remote and unlikely the eventuality of competitive harm, the less pressing the convenience and needs that must be shown.

Finally, Representative Reuss, who exercised every opportunity to construe the statute's terms restrictively, apparently also viewed the word "clearly" as relevant to the quality of the evidence rather than the quantity, for in reporting another difference between his bill and the Ashley-Ottinger bill he noted:

The Reuss proposal, properly, I think *requires the approval* of a merger where "convenience and needs" outweighs the anticompetitive effects.¹

¹ Letter, Rep. Reuss to Attorney General Katzenbach was reported in H.R. #1221, 89th Cong. 2d Session. (10/20/65)

D. THE JUSTICE DEPARTMENT IS ADEQUATELY ADVISED OF THE FACTORS CONSIDERED BY THE COMPTROLLER IN DETERMINING THE CONVENIENCE AND NEEDS OF THE COMMUNITY TO BE SERVED BY A MERGER. THE PLEADINGS IN NEITHER CASE WOULD BE SUFFICIENT TO JUSTIFY A JUDGMENT FOR THE DEPARTMENT OF JUSTICE BEFORE THE INTRODUCTION OF ANY EVIDENCE. AS A SUIT BY JUSTICE PRESUPPOSES ERROR BY THE BANKING AGENCY IN THE APPLICATION OF STATUTORY CRITERIA, THE SUIT IS AN ATTACK ON THE AGENCY'S DETERMINATION THAT CONVENIENCE AND NEEDS OUTWEIGHED THE ANTICOMPETITIVE EFFECT OF THE MERGER, IF ANY. AS THE AGENCY'S DETERMINATION HAS A PRESUMPTIVE VALIDITY, THE PLAINTIFF MUST BE REQUIRED TO DISPROVE THE AGENCY CONCLUSIONS. BMA-88 DOES NOT PROVIDE AN EXCEPTION; IT IS A COMPLETE STATUTORY SCHEME.

The Department of Justice contends that this phrase, "Convenience and Needs," is defensive matter, partly because of its contention that Clayton § 7 has continued applicability, and partly because it should not be compelled to speculate as to what factors are considered.

As part of their "Application to Merge," national banks are required to file a substantial "Economic Brief" which is in large part devoted to a showing of the ways in which the proposed merger will serve the needs of the community. In addition, the opinion of the Comptroller¹² sets out his findings on the convenience and needs factors.¹³ Thus, any necessity for Justice to grope blindly for putative "convenience and needs" factor is more theatrical than real. No one, of course, would preclude the court from inquiring into possible additional factors (Compare Fn 7a in

¹² In the *Houston* case, no opinion of the Comptroller was published until December 1, 1966. This was, however, some 19 days prior to appellant's decision not to assume the burden of negating these factors.

¹³ See in particular pp. 14 and 22-25 of the Opinion dated 12/1/66 and reproduced as Appendix C to appellant's brief at pp. 83, et seq.

the Jurisdictional Statement). This, however, raises questions of the *order*, not the burden, of proof.

The test for determining which party has the burden of establishing a case or issue is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being, of course, on the adverse party." This rule was recently restated by Judge Yankwich in a 9th Circuit case:

The question as to whether the burden of proof in its primary sense rests upon the plaintiff or defendant is ordinarily to be determined by ascertaining from the pleadings which of the parties without evidence would be compelled to submit to an adverse judgment before the introduction of any evidence."

Let us assume, *arguendo*, in this case that plaintiff was to prove that, among financial institutions, in a reasonably premised, adequate "section of the country" this merger would tend to substantially lessen competition and stop there. Could it prevail in the absence of further evidence from any party? We think clearly not.

The procedural scheme of BMA-66 contemplates that a proposed merger will be tested by the bank regulatory agency under the statutory criteria and if that agency finds the criteria have been met it will—only then—approve the proposal. Then, if Justice believes that the bank regulatory agency erred in applying these criteria, it may move the courts to review the decision of that regulatory agency. Thus, *ab initio*, Justice's suit must be premised on agency error. But

¹⁴ *Corpus Juris Secundum*, Evidence § 104.

¹⁵ *Pacific Portland Cement Company v. Food Machinery and Chemical Corp.*, C.A. Calif. 178 F. 2d 541, 547 (1949).

since proof that competition might suffer is not proof that the agency erred (since the merger might still be properly approved), Justice is under the further constraint of proving that the statute was violated—i.e., that “convenience and needs” did not outweigh the anticompetitive effects. For, lacking any evidence on the question, the presumption of regularity which attaches to the decisions of the regulatory agency would then require a dismissal of the complaint.

The general presumption is that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done.”

This particular application is in accord with the general rule that the plaintiff has the burden of proof as to all the elements of his claim or cause of action.” The failure of the plaintiff to sustain such burden is fatal to his recovery.” The fact that the establishment of an affirmative case requires proof of a material negative allegation (anticompetitive effects not out-

⁷⁶ *Matter of Marcellus*, 165 N.Y. 70, 75, 58 N.E. 796, 798. *J. B. Montgomery, Inc. v. U.S.*, D.C. Colo. (1962) 206 F. Supp. 455 Affd. 376 U.S. 389. *Accelerated Transport-Pony Express, Inc. v. U.S.*, D.C. Vt. (1964) 227 F. Supp. 815; Affd. 379 U.S. 4; *Federal Communications Commission v. Schreiber* (1965) 381 U.S. 278; *U.S. ex rel Harris v. Ragen*, C.A. Ill. (1949) 177 F2 303, *B. & O. Railroad Co. v. U.S.*, D.C. Pa. (1965) 249 F. Supp. 712; *Eastern Central Motor Carrier Assn. v. U.S.*, D.C.D.C. (1965) 239 F. Supp. 591.

⁷⁷ *Bell v. Pennsylvania Railroad Co.*, C.A. Ill. 284 F. 2d 297 (1960); *New York, N.H. & H. Railroad Co. v. Seaboard Sales Corp.*, C.A. Mass. 258 F. 2d 376 (1958).

⁷⁸ *Stelling v. Richmond County*, 66 S.E. 2d 807.

weighed by convenience and needs);⁷⁹ such as that the case does not come within exception provided for, does not save the party who makes such an allegation from the burden of pleading⁸⁰ and proving⁸¹ it.

With this conclusion, the courts seem to be in uniform accord:

It seems to be well settled that where the plaintiff in stating his cause of action must affirm a negative, he has the burden of proving the negative averment * * *. This rule applies alike to pleading statutes or contracts.⁸²

The relevance of the locus of the burden to this appeal is this. A complaint has been filed, proof of the material elements of which will not establish even a *prima facie* violation of any statute. It appears inescapable then that plaintiff's pleading is fatally defective.

The further proposition advanced on this point; that "convenience and needs" is a "justification or exemption under a special exception to the prohibitions of a

⁷⁹ We do not, however, accept the "convenience and needs" tests as a negative element of the statute. Since the entire enacting clause is framed in the negative ["The responsible agency shall not approve"] this creates a double negative or an affirmative posture for the convenience and needs factor. Recasting the entire clause in the affirmative; it would read, "The responsible agency shall approve any merger in which the convenience and needs of the community to be served clearly outweighs any substantially anticompetitive effects thereof."

⁸⁰ *Meeks v. Meeks*, 25 So. 668 (Ala. 1946); *Hyde v. Chappell*, 22 S.E. 2d 313 (Ga. 1942).

⁸¹ *Corpus Juris Secundum*, Evidence § 105.

⁸² *Protective Life Insurance Co. v. Swink*, 132 So. 728, 728 (Ala. 1931). See also cases cited in footnote 77 *supra*.

statute generally" and therefore a matter of defense, simply ignores the origins and the purposes of BMA-66.

It must be apparent from the most cursory examination of 5(B) that "Convenience and needs" and "substantially anticompetitive effects" are coordinate factors whose juxtaposition evidenced a Congressional purpose of judicial balancing. With this obvious interpretation the legislative history is, naturally, in accord. Compare quotation from Rep. Smith (Va.), Rep. Smith (Calif.), and Reps. Widnall, Moorhead and Stanton and Senator Proxmire, pp. 24-8, *supra*.

Of course, a decision by this Court that the courts below were substantially correct in their analysis of the nature of the judicial review to be had in these cases would render this discussion largely academic. For if the judicial function is to review the decision of the bank regulatory agency, then the entire emphasis of the suit must be an affirmative assault by Justice on the findings of the agency both as to competitive and banking factors. "Convenience and needs" must—perforce—be an affirmative part of Justice's case.

E. THE OMISSION OF THE PHRASE "LINE OF COMMERCE", TOGETHER WITH THE LEGISLATIVE HISTORY OF THE BANK MERGER ACT OF 1966, CLEARLY DEMONSTRATES THE INTENT OF CONGRESS TO REMOVE BANK MERGERS FROM THE NARROW CONFINES OF SECTION 7 OF THE CLAYTON ACT AND TO IMPOSE A QUALITATIVE COMPETITIVE STANDARD ENCOMPASSING THE ENTIRE FIELD OF FINANCIAL INSTITUTIONS RATHER THAN A QUANTITATIVE STANDARD APPLICABLE ONLY TO COMMERCIAL BANKING.

The Clayton Act, Section 7, reads in pertinent part:

No corporation . . . shall acquire the . . . stock . . . or . . . assets of another corporation . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."¹⁵

The Bank Merger Act of 1966, Section 5(B) reads in pertinent part:

(5) The responsible agency shall not approve—

* * * * *

Any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition or to tend to create a monopoly, or which in any other manner would be in restraint of trade. . . ."

Justice in several of its arguments in the Courts below had postulated that the omission was either harmless error or a deliberate stylistic device to avoid redundancy in a statute where commercial banking comprised the applicable universe.

This argument ignores the canons of statutory construction " . . . thus the legislative language will be interpreted on the assumption . . . that if a change

¹⁵ 15 U.S.C. § 18.

¹⁶ Appendix D, *infra*.

occurs in legislative language, a change was intended in legislative result."⁸⁵ Further, the legislative history of this particular omission impels a conclusion of intent. In *Philadelphia*, supra, the defendants had maintained that commercial banking was not sufficiently distinct to comprise a line of commerce. While the Court agreed that:

[M]any other institutions are in the business of supplying credit and so [are] more or less in competition with commercial banks . . . for example: mutual savings banks, savings and loan associations, credit unions, personal finance companies, sales finance companies, private businessmen (through the furnishing of trade credit) factors, direct-lending government agencies, the Post Office, Small Business Investment Corporations, life insurance companies.⁸⁶

it nevertheless found that commercial banking was an appropriate line of commerce within which to measure the effects of the merger.

Some commercial banking products . . . are "*free of effective competition from . . . other financial institutions.*" (Emphasis supplied.)⁸⁷

The Congressional committees considering the Bank Merger Act were not insensitive to this issue. That the committee had the phrase before it in its consideration of this statute is clear from the House Committee Report accompanying the enacted bill, where the Committee noted:

On the other hand, your committee has heard the contention advanced with equal vigor . . . that

⁸⁵ Sutherland, Statutory Construction, Sec. 4510, 3rd Ed.

⁸⁶ *Supra* p. 326.

⁸⁷ *Ibid.*

any bank merger whose effect may be substantially to lessen competition in any one *line of commerce* in any one section of the country should on that ground alone be absolutely prohibited . . . (Emphasis supplied)**

The parent Ashley-Ottinger Bill contained no "line of commerce" test. There, the reason for the omission was plainly articulated in the accompanying Committee Report.

The Committee recognized that commercial banks *face intensive competition from other financial institutions*—savings and loan associations, mutual savings banks, insurance companies, finance companies, and so forth. The Committee also recognized that competition between commercial banks and other institutions includes local competition, regional competition, national competition and even international competition for one part or another of business. To overlook anyone of these aspects of competition, or to concentrate on one of them to the exclusion of the others, would be unrealistic and might well diminish, not increase, financial competition. (Emphasis supplied.)**

As was demonstrated above, the Ashley-Ottinger bill is in substance the bill enacted. The report's contents deserve, therefore, substantial weight as relevant legislative history.

Further to the same point were the remarks of Senator Robertson in introducing the Bill on the floor of the Senate:

It will be noted that the prohibitory language is based generally on the terms of section 1 of the

** H. R. 1221, *supra*.

** H. R. 1179, 10/19/65.

Sherman Act and section 7 of the Clayton Act. Section 1 of the Sherman Act (15 U.S.C. 1) prohibits contracts, combinations, and conspiracies "in restraint of trade or commerce" while section 7 of the Clayton Act (15 U.S.C. 18), as amended in 1950, prohibits acquisitions" where in any line of commerce in any section of the country the effect may be substantially to lessen competition, or to tend to create a monopoly."

The text of paragraph (B) of the new bill follows the terms of section 1 of the Sherman Act and section 7 of the Clayton Act, with the exception that the reference to "any line of commerce" in the Clayton Act is not carried over into the new bill. In this respect the new bill resembles the Bank Merger Act of 1960, and calls for an appraisal of the overall effects of the merger on competition, weighing increases of competition in one field against decreases in competition in another field. The banking agencies and the courts, in other words, are not intended and are not permitted to select some single, perhaps minor aspect of the banks' business and to say that, because there is some lessening of competition in this element of the business, the overall effects of the merger—the increase of competition in the entire field of banking and in the broader field of financial institutions which may result from other aspects of the merger—are irrelevant and may not be considered.

As the Banking and Currency Committee said in 1959 in reporting out the Bank Merger Act of 1960, we do not want the banking agencies and the courts to say, as did Judge Weinfeld in the Bethlehem-Youngstown merger, "If the merger offends the statute in any relevant market then good motives and even demonstrable benefits are irrelevant and afford no defense." (*U.S.A. v. Bethlehem Steel Corp. et al.*, 168 F. Supp. 576, 1958; see Senate Report No. 196, 86th Cong., S. 1062, pp. 5-6)

We do not want the court to say, as it did in the Philadelphia case, that a merger which may substantially lessen competition in one line of business in one section of the country "is not saved because, on some ultimate reckoning of social debits and credits, it may be deemed beneficial."

We do not want the court to apply a statute which, in the words of the court in the Philadelphia case, proscribes "anticompetitive mergers, the benign and the malignant alike." (Hearings on S. 1698, p. 402)

In considering whether a proposed merger may lessen competition or tend to create a monopoly or be in restraint of trade, the banking agencies and the courts will, of course, take into consideration all the factors which I have discussed under the question of monopoly—the competition from other financial institutions in one or another part of its business, the competition from other banks and other financial institutions, locally, regionally, nationally and internationally, the inevitable limitations on competition imposed by statute and by regulatory authorities, with respect to entry into the business and with respect to the carrying on of the business. All of these factors must be taken into consideration in weighing the overall anticompetitive effects of the proposed merger."

As the underlined portions of the *Philadelphia* opinion and the Ashley-Ottinger committee report emphasize, the House Committee was fully aware of the line of commerce found in Philadelphia and was—plainly—dissatisfied. This same Committee reported out a bill preserving the entire Ashley-Ottinger proposal—virtually identical with it in terminology and precisely identical in purport. It similarly excluded a "line of

⁹⁹ Cong. Rec. 2/9/66 P2541-2.

commerce's test. Justice would have us blind ourselves to this dispositive legislative history.

We believe that this planned omission of a Clayton Act standard with a well-settled judicial construction must be taken as a Congressional mandate that the Court is *not* to consider commercial banking as an area of effective competition, but rather establishes—in banking—a market test, measurable only by larger commercial realities, i.e., “financial institutions.”

The omission of this Clayton Act test further validates the conclusion that it was the intent of Congress to create a new and different statutory standard.

F. THE SUGGESTION THAT THE BANK MERGER ACT OF 1966 IS MERELY A REASSERTION OF THE “FAILING COMPANY” DOCTRINE IS WITHOUT MERIT. CONGRESS CANNOT BE PRESUMED TO PASS UNNECESSARY LEGISLATION. IN ADDITION, THE LEGISLATIVE HISTORY FULLY SUPPORTS THE CONCLUSION THAT MERGERS OF SOUND, COMPETING BANKS COULD BE SUSTAINED UNDER THE STANDARDS OF THE BANK MERGER ACT OF 1966.

Appellant suggests that the *real* purpose of the 1966 Bank Merger Act was to make sure that banks in financial straits could be merged into safer institutions without fear of running afoul of the antitrust laws. This, it proposes, is the substance of the phrase “convenience and needs” of the community.

The failing company doctrine is well recognized in antitrust law. Its broader application to banking cases was carefully noted in *Philadelphia Bank*.

Section 7 does not mandate cutthroat competition in the banking industry, and does not exclude defenses based on dangers to liquidity or solvency, if to correct them a merger is necessary.*

* This, arguably, the so-called failing company defenses, * * * might have somewhat larger contours as applied to bank mergers because of the

greater public impact of a bank failure compared with ordinary business failures."

But if the whole court could subscribe to this notion (and the dissent did so by implication) what valid purpose would be served by solemnly enacting a judicially recognized—and indeed unopposed—principle? We may not assume that Congress legislates to no purpose.

The Committee report and the congressional dialogue also contradict this contention. Although the committee report specifically adverts to the "floundering bank problem" it was in a context explaining that "the disagreements between the Department of Justice and the banking agencies seem to have revolved, *among other things*, around . . . the floundering bank problem and the relevant market problem" (Comm, Rpt. p. 2). This is not to say that Congress' concern was only over these two factors (nor were the disputes between the agencies so limited—as the underlined portion shows). The following exchange during the House debates is quite succinct.

Mr. Weltner:

Is the gentleman saying that the only criterion for public interest as used in the bill is some standard developed around the adequacy of banking facilities?

Mr. Stanton:

No. (p. 2344)

Representative Fino also expressed an unequivocal opinion of a broad base to the public interest factors:

The third aim of the bill, as I see it, is to weaken the applicability of the Antitrust Laws to bank-

²¹ *supra*, pp. 371-2.

ing by allowing economic factors to sometimes outweigh competition per se.

... I also favor the occasional downgrading of strict antitrust criteria where competition per se is clearly not so important in a given situation as the economic effects of the merger—by which I mean better banking service to the community.
P. 2340

Plaintiff's argument is without merit.

The Court in *Crocker* categorically rejected this contention:

"[T]he language * * * from Seaboard * * * would seem to make negative another argument of the Government * * * that * * * 'convenience and needs of the community to be served' is but a reiteration of the 'failing company doctrine' long recognized as 'an integral part of settled antitrust law.' No such limiting suggestion was ever made in the Seaboard Air Line case and the other cases dealing with the same statute. In our view it would be absurd to find that the new standards so carefully framed for the 1966 Bank Merger Act were no more than the inclusion of a wholly unnecessary reference to the 'failing company doctrine.' There is not the slightest indication in the language of the Act, or in its legislative history, to support the Government's effort thus to cancel or dissipate the declared purpose of the Act." (pp. 20-21 Slip Opinion 10/6/66)

As did the court in *Nashville*:

"The plaintiff's restrictive interpretation of the 1966 amendment finds little support either in legislative history or in the text of the amendment itself. On the contrary, both legislative history and the textual provisions of the amendment strongly indicate that it was the intent of Con-

gress to effect substantial changes in existing anti-trust law relative to bank mergers as enunciated in the Lexington and Philadelphia cases." (pp. 12-13 Slip Opinion 11/22/66)

Both Chief Judge Clary in *Provident* and Chief Judge Pence in *Hawaii* have specifically endorsed the opinion in *Crocker*.

G. THE BANK MERGER ACT OF 1966 IS, IN ITSELF, AN ANTI-TRUST LAW WHICH IS THE SOLE STANDARD UPON WHICH TO ASSESS THE LEGALITY OF A BANK MERGER. CONGRESS HAD A SPECIFIC OPPORTUNITY DURING CONSIDERATION OF THIS LEGISLATION TO REASSERT THE APPLICABILITY OF SECTION 7 OF THE CLAYTON ACT TO BANK MERGERS, BUT SUBSTITUTED THE MORE LIBERAL TERMS OF BMA-66 INSTEAD.

Justice's main thrust on the continued applicability of Clayton 7 is that BMA-66, in several places, speaks of violation of antitrust laws; that Section 7 is an antitrust law and therefore it continues to apply. But the legislative history simply will not support the continued application of that statute nor does the logic of continued antitrust applicability support the necessary inclusion of any particular expression of that body of laws.

While Justice is correct that Section 5(A) "is virtually a paraphrasing of Section 2 of the Sherman Act"—indeed it is a paraphrase—this similarity cannot bolster 5(B), since the applicability of Sherman 2 is stated, in so many words, in 7(b), 7(c), Section 2(a) and Section 2(b) of the Act. Nowhere is Sherman 1 or Clayton 7 affirmatively recited in BMA-66. Indeed, the legislative history and canons of statutory construction negative their use.

It will be recalled that, in pertinent part, the report accompanying the Ashley-Ottinger bill had exempted

various situations from antitrust prosecution—except Sherman 2—and as to the rest it “would require the courts to use the new standards of this bill in all cases instituted under the antitrust laws.” Representative Reuss did not like this legislative proposal. It was, in fact, the only portion of the Ashley-Ottinger bill he originally would have changed. As indicated earlier he wished to amend section 5 (keeping the rest) to say:

“(A) unless it finds that such transaction would not involve a violation of section 2 of the Sherman Antitrust Act (15 U.S.C. 2).

“(B) which would violate section 1 of the Sherman Antitrust Act (15 U.S.C. 1) or section 7 of the Clayton Act (15 U.S.C. 18) unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed by the probable effect of the transaction in meeting the convenience and needs of the community to be served.”²²

All interested parties readily agreed to 5(A) which actually did no more than make explicit the clear intentment of the Ashley-Ottinger bill. 5(B) was rejected. But the comparable paragraph of the Ashley-Ottinger bill differed in substance only in its failure to include the Sherman 1 and Clayton 7 standards; viz:

A merger transaction which tends to lessen competition may be approved where the probable adverse competitive effect thereof is clearly outweighed in the public interest by the probable effect of such transaction in meeting the convenience and needs of the community to be served.”²³

²² Fn. 18, *supra*.

²³ Appendix D.

Compare further the language of the bill as ultimately enacted:

The [court and the] responsible agency shall not approve . . . any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

But the series of conferences between the Department of the Treasury, the Department of Justice and the bank regulatory agencies which had resulted in adoption of Representative Reuss' proposed 5(A) produced a contrary result as to 5(B). "However, our attempts to arrive at an agreed position on the language contained in part B of subsection 5 of your proposal which reads—[as above]—were not successful." Now as a scanning of the three sections makes clear, the only substantial difference among them is the attempt in Representative Reuss' proposal to include Clayton 7 and Sherman 1 as specifically applicable antitrust laws. And if it were not enough that the standard was specifically inserted and specifically rejected, the proposal violated the canons of statutory construction.

Plaintiff makes much of the fact that 5(B) uses identical language to the Clayton Act. So do we. Quite clearly, the "substantive rule of law" of 5(B) which

²² *Ibid.*

²³ Ltr. Secretary of the Treasury Fowler to Representative Reuss, 1/3/66, as reported in H. R. 1221, *supra*.

the courts are directed to apply contains something more than Clayton Act standards [convenience and needs]. It also contains something less. As more fully articulated *supra* at pp. 64-9, the omission of "any line of commerce" from the careful recitation of Clayton Act tests implies an intended change in legislative result. If Congress had intended the Clayton Act to govern bank mergers it could have said so. When Representative Reuss tried to do precisely that—and only insofar as he tried to do precisely that—his proposal was rejected.

We think that the simple answer to the meaning of the words "antitrust laws" is that they include this act. Section 2 of the Sherman Act is preserved in terms. That portion of the Clayton Act which Congress wished to use, it recited. It deleted and it added. The courts and the banking agencies were directed to apply these substantive standards (which, in part, chose from among the Clayton Act criteria). What of substance remained to which the Clayton Act might relate?

Admittedly, the application of part of the antitrust laws is being limited by inference. However, the inference is quite a clear one. After all, when one statutory standard is explicitly stated to govern a given fact situation, it does not offend logic to presume that an older, different, more general statute has been ousted. Indeed, Justice itself successfully argued this very point in *Silver*²² when it contended in an amicus brief in this Court that certain self-regulatory powers given the stock exchanges under the SEC Acts of 1933-4 created implied exemptions to the application

²² *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

of the antitrust laws (which had not even been mentioned in the regulatory acts in question).

the principle [is] that exchange self-regulation is to be regarded as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act."

Nor do we go anything like as far as *Silver* here. For while in that case there was "nothing built into the regulatory scheme which performs the antitrust function,"⁸⁸ we deal with a statutory scheme which substitutes one antitrust standard for another and does not "oust" but re-defines the antitrust function.

Even in *Philadelphia Bank* itself, this Court ruled the Clayton Act changed in a substantial manner by inference far more intricate than the direct logic used here. Since the original Clayton Act referred only to stock acquisitions and the amendment only to asset acquisitions, the total legislative pattern in terms did not reach the broad middle ground of mergers and consolidations. These, the Court scooped up *by inference*, arguing: (1) logic, (2) congressional intent, (3) legislative history, and (4) public policy.

A similar articulation here might be framed.

(1) Logic

The inapplicability of the Clayton Act to bank mergers is a logical conclusion from the use of part of its terms with other terms in a specific statutory context.

⁸⁷ *Id.* at 361.

⁸⁸ *Id.* at 358.

(2) Congressional Intent

A congressional intent to treat banking as an industry vested with specialty is manifest in the expressions of congressional purpose culled from the debate and recited at pp. 24-9, *supra*.²²

(3) Legislative History

The rejection of a clause which would have made Clayton 7 and Sherman 1 expressly applicable in favor of another which differed only in that single respect is ample record of a legislative history hostile to continued application of those statutes.

(4) Public Policy

Finally, while the Supreme Court in *Philadelphia Bank* could find a public policy supporting general applicability of the antitrust laws to banking, the action of the Congress in moving to overturn that decision reflects the adoption of a contrary policy. That the reversal of *Philadelphia Bank* was the overriding purpose of Congress is discussed more fully at pages 29-32, *supra*.

In several of the courts below, Justice had advanced, in support of its contention, the supposition that because the Bank Merger Act provides that the antitrust laws (defined to include Sections 1-7 of the Sherman Act; Section 1-16 of the Clayton Act; and all other acts in *pari materia*) remain applicable to bank mergers, that therefore Section 1 of the Sherman Act and Section 7 of the Clayton Act are specifically ap-

²² As Representative Rostenkowski noted during the debates: "Congress decided long ago that the special position of banking meant that we could not rely exclusively on unregulated competition in banking." Cong. Rec., 2/8/66, p. 2354.

plicable. But applicability of the whole—i.e., the body of the Sherman and Clayton Acts—can only require applicability of any specific part, if it does so for each such part.

Thus, among the putatively applicable antitrust laws are the following:

Section 2 of the Clayton Act, the Robinson-Patman Act, which applies civil and criminal penalties in the event of price discrimination among buyers and sellers.

Section 3 of the Clayton Act, making illegal tie-in sales of commodities, which exclude bank services.

Section 6 of the Clayton Act, exempting labor unions, agricultural corporations, and horticultural associations from the application of the antitrust laws.

Section 9 of the Clayton Act, establishing embezzlement by officials of common carriers as a felony.

Section 10, placing restrictions on purchases by common carriers from firms who have an official on the carrier's board.

And several others to the same effect.

Plainly, these do not relate in any way to bank mergers. The term "the antitrust laws continue to apply" must be taken to be limited to those sections not otherwise negatived, whether by their internal logic or by conflict with the controlling terms of this particular statute.

Of course, the simple answer to plaintiff's argument is that the Bank Merger Act of 1966 is itself an anti-trust law. Here Sections 5(B) and 7(B) perform the antitrust function. This is a statutory scheme which substitutes one antitrust standard for another. It does not oust but changes the antitrust function.

CONCLUSION

Fairly viewed, BMA-66 is an expression of Congressional intent that where the duties of the bank regulatory agencies directly affect the antitrust policy of the country, initial responsibility for enforcing that policy and modifying it, if and as required by the needs of the particular industry, will rest with those agencies. The decisions of those agencies should be overturned on judicial review only on proof of legal error, or, on the merits, a showing that the decision was not supported by substantial evidence, or was arbitrary or capricious. Such is the usual legislative scheme governing regulated industries. Its application here is not the creation, but the removal, of an anomaly.

Accordingly, we urge that the decisions in the courts below should be affirmed.

Respectfully submitted,

ROBERT BLOOM,
Chief Counsel,

JOSEPH J. O'MALLEY,
Associate Chief Counsel,

CHARLES H. McENERNEY, JR.,
Associate Chief Counsel,

PHILIP L. ROACHE, JR.,
EUGENE J. METZGER,
GILBERT L. AMYOT,
*Attorneys for the
Comptroller of the Currency*

February, 1967

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APPENDIX A

THOMAS LUDLOW ASHLEY
9th District, Ohio

COMMITTEES:
Banking and Currency
Merchant Marine and Fisheries

CONGRESS OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

Washington, D. C.

FOR A.M. RELEASE

Saturday, October 16, 1965

From the office of

U.S. REP. THOMAS L. ASHLEY (D., Ohio)

CHAIRMAN OF HOUSE BANKING AND CURRENCY COMMITTEE ACCUSED BY REP. ASHLEY (D., OHIO) OF BLOCKING BANK MERGER BILL

U.S. Rep. Thomas Ludlow Ashley, (D., Ohio) today charged that the integrity and prestige of the House Committee on Banking and Currency have been threatened by the tactics of the Committee's Chairman, Wright Patman (D., Tex.) which Ashley said have "made a mockery of sincere efforts to develop responsible legislation relative to bank mergers." In a letter to Chairman Patman Rep. Ashley, a senior member on the Banking Committee, said that parliamentary procedure has been flaunted, the wishes of the majority of the Committee thwarted, and every dilatory and obstructionist tactic at Patman's command resorted to in his efforts to prevent the Committee from exercising its will on bank merger legislation prior to the adjournment of Congress.

THOMAS LUDLOW ASHLEY
9th District, Ohio

COMMITTEES:
Banking and Currency
Merchant Marine and Fisheries

CONGRESS OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

Washington, D. C.

October 15, 1965

Honorable Wright Patman
Chairman
Banking and Currency Committee
House of Representatives
Washington, D. C.

Dear Mr. Chairman:

I am deeply concerned, as are most of the members of the House Committee on Banking and Currency, over recent developments which go far beyond the bank merger legislation before us and which, indeed, threaten the integrity and prestige of the Committee on which we serve.

I believe a brief chronology of events will serve to bring this serious situation into clear focus and perspective.

On June 11, 1965, the Senate passed by voice vote S. 1698, a bill to establish a procedure for the review of proposed bank mergers.

On June 14, 1965, S. 1698 was referred to the Committee on Banking and Currency.

On July 19, 1965, 26 of the 33 members of the House Banking Committee, after being informed by the Committee staff that no hearings were contemplated, directed a letter to you asking that hearings on S. 1698 be scheduled promptly.

On August 3, 1965, you announced that the Domestic Finance Subcommittee, of which you are Chairman, rather than the Subcommittee on Bank Supervision and Insurance, would hold hearings commencing on August 11 on S. 1698 and related measures.

On August 11, 1965, you issued the first of many statements, accompanied by a press release on Committee letterhead, openly critical of the bank merger legislation before your Committee.

On September 13, 1965, after more than a month of hearings on S. 1698, I introduced H. R. 11011 and identical bills were offered on the same date by 18 other members of the House Committee on Banking and Currency.

On September 17, 1965, I directed a letter to you referring to a discussion earlier that day in which you indicated your willingness to respect the majority sentiments of the Committee with regard to concluding hearings on the bank merger legislation. I informed you that I had talked to 22 members of the Committee, each of whom expressed their judgment that the current hearings should be concluded no later than September 24, and that the Subcommittee on Domestic Finance report promptly thereafter to the full Committee, in no event later than September 28.

On September 21, 1965, you replied that (1) the Subcommittee should continue to hold complete and extensive hearings on the bank merger bill and (2) that when the Subcommittee had done this and reported to the full Committee, you would "at that point certainly yield to the desires of the majority of the full Committee in this matter."

On September 24, 1965, a letter was directed to you, as Chairman of the Banking Committee, from Attorney General Katzenbach expressing the views of the Department of Justice, the Department of the Treasury, the Comptroller of the Currency and the Federal Deposit Insurance Corporation on the subject of bank merger legislation. Briefly stated, this letter expressed unanimous agreement among the above-mentioned departments and agencies that (1) past mergers should not be subject to the retroactive application of Section 1 of the Sherman Act or Section 7 of the Clayton Act and (2) that "the banking factors taken into account by the banking agencies under the Bank Merger Act of 1960 should also be taken into account by the Courts—the proposition which underlies H. R. 11011." Attorney General Katzenbach objected to forgiveness of past mergers already found by the Courts to be in violation of the anti-trust laws; the Comptroller of the Cur-

rency disagreed with the Attorney General; the Secretary of the Treasury and the Chairman of the FDIC stated that they believed the matter to be within the purview of the Department of Justice.

On September 27, 1965, you called Democratic members of the Banking Committee into caucus in an effort to reach agreement on a draft bill which you outlined to the members present. No mention was made of the contents of the Katzenbach letter which had been delivered by special messenger to the Banking and Currency Committee on September 25, 1965.

On September 29, 1965, 19 members of the Banking Committee directed a letter to you, pursuant to Section 25 of Rule XI of the Rules of the House of Representatives, requesting that, within 3 days, you call a special meeting of the Committee for the purpose of acting upon S. 1698 and related or similar bills.

On October 1, 1965, the Subcommittee on Domestic Finance met and reported by a 7-5 vote S. 1698, as amended, a bill which differed widely from the suggestions contained in the Katzenbach letter of September 24.

On October 1, 1965, you issued a Committee notice advising members that the full Committee would meet in executive session on Tuesday, October 5, to consider S. 1698, as amended and reported to the full Committee.

On October 1, 1965, I sent to you and to each member of the Committee a copy of the substitute which I said I intended to offer, representing the position on bank merger legislation agreed upon by the Department of Justice, Department of the Treasury, Comptroller of the Currency and FDIC, with one exception—my substitute would validate all mergers occurring before the Philadelphia case was decided (June 17, 1963); others would be held to the criteria set forth in my original bill, H. R. 11011, and agreed upon by the above department and agency heads. As you know, with respect to validation of mergers prior to the Philadelphia case, this is essentially the same position taken by the Subcommittee bill.

On October 4, 1965, without prior notice to or approval of the Committee membership, you announced by press release that you would "insist" that the October 5 session be open to the public as a result of "arbitrary attempts by some Committee members to rush through legislation without adequate hearings." The release stated that the Ashley bill introduces "totally new standards" on bank mergers and that my bill "would virtually eliminate the application of the anti-trust laws to bank mergers." You were perfectly well aware, of course, that the standards contained in my bill are identical with those set forth in the Bank Merger Act of 1960 and you also knew that Attorney General Katzenbach had explicitly agreed that the Courts should consider the same standards as the banking agencies, including the anti-trust laws, in determining the validity of bank mergers. You also felt impelled to repeatedly impugn the motives of members who introduced H. R. 11011 and you even went so far as to charge that this constituted a "revolt against anti-trust laws" and "an attack upon the Kennedy-Johnson Administrations."

On October 5, 1965, you directed that the executive session called for in the Committee notice of October 1 be open to the press and public. When members pointed out that Sec. 25 of Rule XI of the Rules of the House of Representatives provides for a "special meeting of the Committee," and despite a Rule of both the House and our Committee that executive sessions shall be held in private except when the Committee by majority decision decides to admit the public, you insisted that it was within your prerogatives as Chairman to hold a public session. When appeal was sought to be taken from this ruling, you dismissed it summarily, again in clear violation of the Rules of Procedure by which the Committee is meant to operate. Instead, you insisted that a motion be made by members wishing to go from public session, where pursuant to the Rules of the House and Committee we never should have been, into closed session, where we should have been in the

first place. Based upon your comments at the time, it is clear that these efforts were intended to cast members in disagreement with you in the worst possible light with the press. A reading of the transcript also reveals clearly that subsequent efforts to reach agreement on duration of debate were held to be not in order, again with no appeal from these erroneous decisions by the Chair.

On October 8, 1965, the Committee met, considered S. 1698 as amended, and then voted to recess until 10:00 Monday morning, October 11.

On October 11, 1965, consideration of S. 1698 as amended continued. At your urging, a motion was offered that the Committee recess to Thursday, October 14, because of Columbus Day (October 12) and to accommodate speaking engagements of the Chairman (October 13) but the motion was voted down. A preferential motion offered by Mr. Moorhead was then pending which would have recessed the Committee until Tuesday morning, October 12. However, when the House went into session at 12:00 Noon, the Moorhead motion could not be voted upon. Despite your earlier protestations that the next session would be scheduled at the convenience of the Committee, you thereupon adjourned the session subject to the call of the Chair.

On October 11, 1965, because of your failure to set a time and date for the next session, a second letter was directed to you pursuant to Sec. 25 of Rule XI requesting that a date be set for continuing consideration of S. 1698 as amended.

On October 13, 1965, you returned from your speaking engagement in Texas. A session of the Committee could have been scheduled for Thursday, October 14, or Friday, October 15. Instead, you issued a press release, again without prior notice to or consultation with the Committee membership, advising that a session was scheduled for 9:30 A.M. Monday, October 18, to consider a \$120 million authorization bill for the Small Business Administration, after which there would be further consideration of S. 1698 as amended and related bills.

This is the sorry story, step by step, that has made a mockery of sincere efforts to develop responsible legislation relative to bank mergers. Since the Senate bill was referred to your Committee on June 11, a majority of the Committee has been obliged to insist upon each and every legislative step that has been taken. From the time you acceded to the letter of September 29, signed by 19 members, requesting a special meeting for the purpose of acting upon S. 1698 as amended, you have permitted exactly 3 sessions to take place for this purpose. Time after time parliamentary procedure has been flaunted, the wishes of a majority of the Committee thwarted, and every dilatory and obstructionist tactic at your command resorted to in your efforts to prevent the Committee from exercising its will on bank merger legislation prior to the adjournment of Congress. The record speaks for itself and it is a record of which no member of the Committee or, indeed, of the House can be proud.

Because the activities and conduct of the House Banking and Currency Committee are as much a matter of public concern as the Congress itself, I intend to release this letter to the press. I do so with very real reluctance and only in the hope that the scrutiny and judgment of the public may serve to bring about improvements in the legislative process which I believe to be absolutely essential.

Yours truly,

THOMAS LUDLOW ASHLEY, M. C.

APPENDIX B

HOUSE OF REPRESENTATIVES
COMMITTEE ON BANKING AND CURRENCY
Eighty-Ninth Congress
2129 Rayburn House Office Building
Washington, D.C.

WRIGHT PATMAN, Tex., Chairman
ABRAHAM J. MULLEN, N.Y.
WILLIAM A. BARRETT, Pa.
LEONOR K. SULLIVAN, Mo.
HENRY S. REUSS, Wis.
THOMAS L. ASHLEY, Ohio
WILLIAM S. MOORHEAD, Pa.
ROBERT G. STEPHENS, Jr., Ga.
FERNAND J. ST. GERMAIN, R.I.
HENRY B. GONZALES, Tex.
JOSEPH G. MINISH, N.J.
CHARLES L. WELTNER, Ga.
RICHARD T. HANNA, Calif.
BERNARD F. GRABOWSKI, Conn.
COMPTON I. WHITE, Jr., Idaho
TOM S. GETTYS, S.C.
PAUL H. TODD, Jr., Mich.
RICHARD L. OTTINGER, N.Y.
EARLE CARELL, Tex.
THOMAS C. McGRATH, Jr., N.J.
JOHN B. HANSEN, Iowa
FRANK ANNUNZIO, Ill.

WILLIAM B. WIDNALL, N.J.
PAUL A. FING, N.Y.
FLORENCE P. DWYER, N.J.
SEYMOUR HALPERN, N.Y.
JAMES HARVEY, Mich.
W. E. (BILL) BROCK, Tenn.
BURT L. TALCOTT, Calif.
DEL CLAWSON, Calif.
ALBERT W. JOHNSON, Pa.
J. WILLIAM STANTON, Ohio
CHESTER L. MIZE, Kans.

PAUL NELSON
Clerk and Staff Director

CA 4-3121, EXT. 4247

FOR IMMEDIATE RELEASE

Deem x 4247

WASHINGTON, D.C., October 21—Chairman Wright Patman today released a staff report detailing the activities of a rump session attempted by some members of the Committee last Tuesday.

The report, prepared by staff members who witnessed the rump session, showed:

1. That the regular third Tuesday meeting, under which the group claimed to be operating, had been duly cancelled by Chairman Patman;

2. That no quorum was present on any votes taken in the rump session; and

3. That the Chairman, a number of other members of the Committee, and the staff were not informed about the plans to hold the session.

The report is attached.

Att:

HOUSE OF REPRESENTATIVES
COMMITTEE ON BANKING AND CURRENCY
 Eighty-Ninth Congress
 2129 Rayburn House Office Building
 Washington, D.C.

WRIGHT PATMAN, Tex., Chairman
 ABRAHAM J. MULTER, N.Y.
 WILLIAM A. BARRETT, Pa.
 LEONOR K. SULLIVAN, Mo.
 HENRY S. REUSS, Wis.
 THOMAS L. ASHLEY, Ohio
 WILLIAM S. MOORHEAD, Pa.
 ROBERT G. STEPHENS, JR., Ga.
 FERNAND J. ST. GERMAIN, R.I.
 HENRY B. GONZALEZ, Tex.
 JOSEPH G. MINISH, N.J.
 CHARLES L. WELTNER, Ga.
 RICHARD T. HANNA, Calif.
 BERNARD F. GRABOWSKI, Conn.
 COMPTON I. WHITE, JR., Idaho
 TOM S. GETTYS, S.C.
 PAUL H. TODD, JR., Mich.
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 EARLE CABELL, Tex.
 THOMAS C. McGRATH, JR., N.J.
 JOHN B. HANSEN, Iowa
 FRANK ANNUNZIO, Ill.

WILLIAM B. WIDNALL, N.J.
 PAUL A. FINO, N.Y.
 FLORENCE P. DWYER, N.J.
 SEYMOUR HALPERN, N.Y.
 JAMES HARVEY, Mich.
 W. E. (BILL) BROOK, Tenn.
 BURT L. TALCOTT, Calif.
 DEL CLAWSON, Calif.
 ALBERT W. JOHNSON, Pa.
 J. WILLIAM STANTON, Ohio
 CHESTER L. MIZE, Kans.

PAUL NELSON
 Clerk and Staff Director

CA 4-3121, EXT. 4247

October 20, 1965

MEMORANDUM

TO: Chairman Patman
 FROM: Paul Nelson

As directed by you I am setting forth several facts concerning the gathering of various Members of the Banking and Currency Committee in the Committee's hearing room on the morning of October 19, 1965, as I and several of the staff observed them.

First, you will recall that on Monday, October 18, I informed you of the fact that Tuesday, October 19, was the

regularly constituted meeting day of the Banking and Currency Committee. In reply you informed me that the Committee would not meet that day and as such directed a memorandum to me so stating. The full text of your memorandum to me follows:

October 18, 1965

MEMORANDUM

TO: Paul Nelson, Clerk
FROM: Wright Patman, Chairman

Rule I of the Rules of Procedure of the Committee on Banking and Currency for the 89th Congress states that the Committee shall meet at 10 a.m. on the first and third Tuesdays of each month unless cancelled by the Chairman.

The Banking and Currency Committee will not meet on October 19, 1965, which is the third Tuesday in the month.

Since it is customary only when a Committee meeting is scheduled to notify the Members, it will not be necessary for you to notify the Members that the meeting has been cancelled.

What follows is a rendition of the observations made by several members of the staff regarding the occurrence in the Committee's quarters on the morning of October 19:

1. Mrs. Deem observed while sitting at her desk in the outer office that Congressman Ottinger's Administrative Assistant, Mr. Paul A. Schusberg, came in and asked for Congressman Ottinger. Mr. Schusberg told Mrs. Deem that he was waiting for Mr. Ottinger, and that the Congressman was coming to the Committee room prior to going to his office.

Several moments later Mr. Moorhead entered the Committee's anteroom and stated to Mrs. Deem that he wanted to get something out of his desk in the Committee hearing room. Mrs. Deem went with Mr. Moorhead and asked if he wanted the lights turned on since it was quite dark in

the Committee room. Mr. Moorhead replied that he thought he could find what he needed without turning the lights on. At that point Mrs. Deem retired from the Committee room.

Mrs. Deem observed, after the passage of another five or six minutes, that there was a great deal of shuffling and noise emanating from the hearing room. She then started back into the Committee room to determine what had occurred, and at that point Mr. Annunzio came through the door from the Committee room indicating that it was dark in the hearing room. Mr. Annunzio asked if he could have the lights turned on because there were a "lot of Members in there." Mrs. Deem then proceeded to turn on the lights.

2. Several members of the staff notified me that commencing at 10 o'clock various Members of the Committee were milling outside the doors of the Committee room in the corridor and subsequently Mrs. Deem and others informed me that various Members had entered the hearing room and taken their chairs.

I then called you and you indicated that I was to inform the Members of the Committee that you were unavoidably detained for an emergency matter and that no meeting could be considered until the Chairman arrived to consider it; that the meeting for the 19th had already been cancelled which was authorized under Committee rules. I dictated a memorandum to this effect to carry into the hearing room, and prior to entering the hearing room met Mr. Annunzio. I informed Mr. Annunzio of your whereabouts and also presented him with a copy of the memorandum of October 18 from the Chairman cancelling the meeting. It is my understanding that Mr. Annunzio took this memorandum into the Committee room and presented it to Mr. Ashley who was occupying the Chair at the time.

3. At approximately 10:15 a.m. several members of the staff were sitting in the hearing room and noted that Mr. Reuss had at that time entered the Committee room and as senior majority member present assumed the Chair. Mr. Annunzio was recognized at this point by the Chair and

asked the Chairman to rule whether or not the meeting was legally constituted. Mr. Reuss stated that as the ranking member present he would first determine whether or not a valid meeting was in progress, pursuant to the Committee rules and the rules of the House. Mr. Reuss questioned several Members concerning the reason for the meeting and the circumstances under which it was called, including proper notice to all the Members. Mr. Reuss also referred to the telephone message received from Chairman Wright Patman as well as the memorandum dated October 18, 1965, as noted above, that the Committee meeting for Tuesday, October 19, had been cancelled. Mr. Reuss presiding then ruled that the gathering did not constitute a valid meeting of the Committee under the rules of the Committee and of the House, ordered the group disbanded, and withdrew from the Committee room along with Mr. Annunzio.

4. It was noted by five members of the Committee staff that at approximately 10:56 a.m. there were 15 Members of the Banking and Currency Committee within the Committee room. These Members were: Messrs. Moorhead (who was in the Chairman's chair), Ashley, Stephens, Grabowski, Gettys, Ottinger, Cabell, Widnall, Fino, Mrs. Dwyer, Messrs. Halpern, Clawson, Johnson, Stanton, and Mize.

5. The Committee staff also noted that at approximately 11:12 a.m. 15 Members of the Committee were present as follows: Messrs. Moorhead (in the Chairman's chair), Ashley, Stephens, Grabowski, Gettys, Ottinger, Cabell, Widnall, Fino, Mrs. Dwyer, Messrs. Halpern, Clawson, Johnson, Stanton, and Mize.

At 11:15 a.m., Mr. Halpern left the room. At 11:15 a.m., Mr. Moorhead (from the Chairman's chair) moved under the "procedures previously adopted" the question regarding the Ottinger amendment. The amendment, according to Mr. Moorhead, carried by voice vote. At approximately 11:16 a.m., Mr. Moorhead moved the question on the Ashley

substitute as amended by the Ottinger amendment. According to Mr. Moorhead it carried unanimously by voice vote. The vote was announced at approximately 11:19 a.m.

Mr. Stephens asked that the record show that the Committee staff members Nelson, Morse, Prins and the microphone operator (G. McMurray) were present. At no time were the staff members able to count more than 16 Members in the Committee room at any one time. The staff was informed by Mr. Multer, Mrs. Sullivan, Messrs. Reuss, Gonzalez, Minish, and Todd that none of them was informed in advance of the purported meeting. It is likely that several other Members also received no notice.

During the course of the proceedings, the staff noted that, on every vote taken, proxies executed by absent Members were voted. Under rules of the Committee, proxies cannot be counted as part of a quorum.

6. At approximately 11:40 it was noted by members of the Committee staff that Chairman Patman entered the room and assumed his seat. The Chairman ruled that the gathering did not constitute a duly called and assembled meeting of the Committee, that there was no record of the gathering, that it was strictly informal, but invited the Members to freely discuss any matter they wished. Mr. Todd made the point of order that a quorum was not present. The Chairman responded that there was not a valid Committee meeting in the first place.

7. It should also be reported that the Ward & Paul reporter who appeared at this gathering informed Committee staff (as was subsequently verified by Mr. Ward, of Ward & Paul) that Ward & Paul's office had been called the previous day to have a reporter present in Mr. Moorhead's office to transcribe a "technical hearing" and that Mr. Moorhead would pay for the services. The reporter informed Committee staff that he arrived at Mr. Moorhead's office at 9:30 and Mr. Moorhead took him to the Committee hearing room whence he began by direction of Mr. Moorhead to transcribe the minutes of the gathering.

APPENDIX C

27594

October 22, 1965

CONGRESSIONAL RECORD—HOUSE

HOUSE COMMITTEE ON BANKING
AND CURRENCY

(Mr. ASHLEY (at the requests of Mr. DYAL) was granted permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. ASHLEY. Mr. Speaker, under a special order on Tuesday, October 19, the gentleman from Texas [Mr. PATMAN] took the floor to denounce what he characterized as a "rump session" of the House Committee on Banking and Currency. I want to take just a few moments to set the record straight.

Rule I of the rules of the Banking Committee provides that the committee shall meet every first and third Tuesday of the month unless the meeting is cancelled by the chairman. When Chairman PATMAN did not cancel last Tuesday's meeting, the committee met and, in the absence of the chairman and pursuant to clause 3 of rule X of the Rules of the House of Representatives—which provide that in the temporary absence of the chairman the next ranking member shall preside—I called the meeting to order at 10:07 a.m. on Tuesday, October 19.

The committee first adopted a detailed procedural resolution offered by our colleague, the gentleman from Pennsylvania. [Mr. MOORHEAD]. Subsequently, when the gentleman from Wisconsin [Mr. REUSS] entered the meeting, he was offered and took the chair as ranking member, again in accordance with clause 3 of rule X. When the gentleman from Wisconsin [Mr. REUSS] ruled that the meeting was not duly constituted, the ruling was appealed and the members of the committee voted overwhelmingly to sustain the appeal.

The committee then voted down an amendment which had been offered at a previous meeting by the gentleman from

New York [Mr. MULTER]. I then offered a substitute to the bank merger bill that was reported by the Domestic Finance Subcommittee on October 1, 1965. An amendment was offered by the gentleman from New York [Mr. OTTINGER] and, when this was accepted unanimously, the Ashley substitute was adopted also unanimously.

The gentleman from South Carolina [Mr. GETTYS] then moved to direct the chairman or a member in favor of the bill to submit a report of the committee to the House of Representatives and a second motion to direct the members supporting the motion to take all necessary and desirable parliamentary steps to insure early and favorable consideration by the House. These latter two motions carried by a vote of 17 to 1 with the chairman of the full committee, the gentleman from Texas [Mr. PATMAN], present but not voting. Two of the votes in favor were cast by proxies held by the gentleman from New Jersey [Mr. WIDNALL].

When the House convened at noon on October 19, I obtained unanimous consent to have until midnight that night to file the report of the committee.

In an effort to support his charge that this meeting was illegal, the gentleman from Texas [Mr. PATMAN] has stated publicly that first, the regular meeting of the committee had been canceled; and second, that a quorum was never present at the meeting.

With respect to the alleged cancellation of the meeting, the gentleman from Texas [Mr. PATMAN] relies upon his memorandum to Paul Nelson, clerk of the committee, dated October 18, which reads as follows:

Rule I of the Rules of Procedure of the Committee on Banking and Currency for the 89th Congress states that the committee shall meet at 10 a.m. on the first and third Tuesday of each month unless cancelled by the Chairman.

The Banking and Currency Committee will not meet on October 19, 1965, which is the third Tuesday in the month.

Since it is customary only when a committee meeting is scheduled to notify the members, it will not be necessary for

you to notify the members that the meeting has been canceled.

The last sentence, of course, is all important. Clearly, what the gentleman from Texas [Mr. PATMAN] contends is that the cancellation provided for in rule I of the committee's rules can be accomplished by the chairman's not taking action to schedule a meeting, rather than by affirmative action notifying the members that a meeting will not take place.

We submit that this interpretation is totally unsupported by accepted legislative construction.

With respect to the presence of a quorum, 16 members of the committee have affixed their signatures to tally slips used to record the votes on the two motions made by the gentleman from South Carolina [Mr. GETTYS]. In addition, at that time the gentleman from Texas [Mr. PATMAN] himself was present and in the chair but did not vote. He claims that although he was physically present, he was not present in any official capacity and, therefore, cannot be counted for purposes of a quorum.

One cannot help but be reminded of the nursery rhyme which goes:

Yesterday upon the stair
I saw a man who wasn't there;
He wasn't there again today,
Oh, how I wish he'd go away.

In all seriousness, Mr. Speaker, we submit that the committee meeting on October 19 was in strict conformance with rule I of the committee's rules, that a quorum was present and that S. 1698 with amendments was passed and properly reported to the House.

In order that the House may be fully informed, I believe the following brief chronology of events will prove helpful:

On June 11, 1965, the Senate passed by voice vote S. 1698, a bill to establish a procedure for the review of proposed bank mergers.

On June 14, 1965, S. 1698 was referred to the Committee on Banking and Currency.

On July 19, 1965, 26 of the 33 members of the House Banking Committee, after being informed by the committee staff that no hearings were contemplated, directed a letter to Chairman PATMAN asking that hearings on S. 1698 be scheduled promptly.

On August 3, 1965, Chairman PATMAN announced that the Domestic Finance Subcommittee, of which the gentleman from Texas [Mr. PATMAN] is chairman, rather than the Subcommittee on Bank Supervision and Insurance, would hold hearings commencing on August 11 on S. 1698 and related measures.

On August 11, 1965, the gentleman from Texas [Mr. PATMAN] issued the first of many statements, accompanied by a press release on committee letterhead, openly critical of the bank merger legislation before his committee.

On September 13, 1965, after more than a month of hearings on S. 1698, I introduced H.R. 11011 and identical bills were offered on the same date by 18 other Members of the House Committee on Banking and Currency.

On September 17, 1965, I directed a letter to the gentleman from Texas, Chairman PATMAN, referring to a discussion earlier that day in which he indicated his willingness to respect the majority sentiments of the committee with regard to concluding hearings on the bank merger legislation. I informed the gentleman from Texas [Mr. PATMAN] that I had talked to 22 members of the committee, each of whom expressed their judgment that the current hearings should be concluded no later than September 24, and that the Subcommittee on Domestic Finance report promptly thereafter to the full committee, in no event later than September 28.

On September 21, 1965, the gentleman from Texas, Chairman PATMAN, replied that first, the subcommittee should continue to hold complete and extensive hearings on the bank merger bill; and, second, that when the subcommittee

had done this and reported to the full committee, he would "at that point certainly yield to the desires of the majority of the full committee in this matter."

On September 24, 1965, a letter was directed to the gentleman from Texas [Mr. PATMAN], as chairman of the Banking Committee, from Attorney General Katzenbach expressing the views of the Department of Justice, the Department of the Treasury, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation on the subject of bank merger legislation. Briefly stated, this letter expressed unanimous agreement among the above-mentioned departments and agencies that, first, past mergers should not be subject to the retroactive application of section 1 of the Sherman Act or section 7 of the Clayton Act, and second, that "the banking factors taken into account by the banking agencies under the Bank Merger Act of 1960 should also be taken into account by the courts—the proposition which underlies H.R. 11011." Attorney General Katzenbach objected to forgiveness of past mergers already found by the courts to be in violation of the antitrust laws; the Comptroller of the Currency disagreed with the Attorney General; the Secretary of the Treasury and the Chairman of the FDIC stated that they believed the matter to be within the purview of the Department of Justice.

On September 27, 1965, Chairman PATMAN called Democratic members of the Banking Committee into caucus in an effort to reach agreement on a draft bill which he outlined to the members present. No mention was made of the contents of the Katzenbach letter which had been delivered by special messenger to the Banking and Currency Committee on September 25, 1965.

On September 29, 1965, 19 members of the Banking Committee directed a letter to the gentleman from Texas, Chairman PATMAN, pursuant to section 25 of rule XI of the Rules of the House of Representatives, requesting that, within 3 days, he call a special meeting of the committee for the purpose of acting upon S. 1698 and related or similar bills.

On October 1, 1965, the Subcommittee on Domestic Finance met and reported by a 7-to-5 vote S. 1698, as amended, a bill which differed widely from the suggestions contained in the Katzenbach letter of September 24.

On October 1, 1965, the gentleman from Texas, Chairman PATMAN, issued a committee notice advising members that the full committee would meet in executive session on Tuesday, October 5, to consider S. 1698, as amended and reported to the full committee.

On October 1, 1965, I sent to the gentleman from Texas, Chairman PATMAN, and to each member of the committee a copy of the substitute which I said I intended to offer, representing the position on bank merger legislation agreed upon by the Department of Justice, Department of the Treasury, Comptroller of the Currency and FDIC, with one exception—my substitute would validate all mergers occurring before the Philadelphia case was decided—June 17, 1963; others would be held to the criteria set forth in my original bill, H.R. 11011, and agreed upon by the above department and agency heads. With respect to validation of mergers prior to the Philadelphia case, this is essentially the same position taken by the gentleman from Texas [Mr. PATMAN] subcommittee bill.

On October 4, 1965, without prior notice to or approval of the committee membership, the gentleman from Texas, Chairman PATMAN, announced by press release that he would "insist" that the October 5 session be open to the public as a result of "arbitrary attempts by some committee members to rush through legislation without adequate hearings." The release stated that the Ashley bill introduces "totally new standards" on bank mergers and that my bill "would virtually eliminate the application of the antitrust laws to bank mergers." Mr. PATMAN was perfectly well aware, of course, that the standards contained in my bill are identical with those set forth in the Bank Merger Act of 1960 and you also knew that Attorney General Katzenbach had explicitly agreed that the courts should consider

the same standards as the banking agencies, including the antitrust laws, in determining the validity of bank mergers. Mr. PATMAN also felt impelled to repeatedly impugn the motives of members who introduced H.R. 11011 and he even went so far as to charge that this constituted a "revolt against antitrust laws" and "an attack upon the Kennedy-Johnson administrations."

On October 5, 1965, the gentleman from Texas, Chairman PATMAN, directed that the executive session called for in the committee notice of October 1 be open to the press and public. When members pointed out that section 25 of rule XI of the Rules of the House of Representatives provides for a "special meeting of the committee," and despite a rule of both the House and our committee that executive sessions shall be held in private except when the committee by majority decision decides to admit the public, the gentleman from Texas [Mr. PATMAN] insisted that it was within his prerogatives as chairman to hold a public session. When appeal was sought to be taken from this ruling, the gentleman from Texas, Chairman PATMAN, dismissed it summarily, again in clear violation of the Rules of Procedure by which the committee is meant to operate. Instead, he insisted that a motion be made by members wishing to go from public session, where pursuant to the Rules of the House and committee we never should have been, into closed session, where we should have been in the first place. Based upon the chairman's comments at the time, it is clear that these efforts were intended to cast members in disagreement with him in the worst possible light with the press. A reading of the transcript also reveals clearly that subsequent efforts to reach agreement on duration of debate were held to be not in order, again with no appeal from these erroneous decisions by the Chair.

On October 8, 1965, the committee met, considered S. 1698 as amended, and then voted to recess until 10 Monday morning, October 11.

On October 11, 1965, consideration of S. 1698 as amended continued. At the gentleman from Texas' [Mr. PATMAN]

urging, a motion was offered that the committee recess to Thursday, October 14, because of Columbus Day—October 12—and to accommodate speaking engagements of the chairman—October 12—but the motion was voted down. A preferential motion offered by the gentleman from Pennsylvania [Mr. MOORHEAD] was then pending which would have recessed the committee until Tuesday morning, October 12. However, when the House went into session at 12 noon, the Moorhead motion could not be voted upon. Despite the chairman's earlier protestations that the next session would be scheduled at the convenience of the committee, he thereupon adjourned the session subject to the call of the Chair.

On October 11, 1965, because of Chairman PATMAN's failure to set a time and date for the next session, a second letter was directed to him pursuant to section 25 of rule XI requesting that a date be set for continuing consideration of S. 1698 as amended.

On October 13, 1965, the gentleman from Texas, Chairman PATMAN, returned from his speaking engagement in Texas. A session of the committee could have been scheduled for Thursday, October 14, or Friday, October 15. Instead, Chairman PATMAN called a meeting for 10:30 a.m. on October 18.

On October 18, 1965, Chairman PATMAN, the gentleman from Texas, called the meeting to order and, establishing that a quorum was not then present, he adjourned the committee subject to the call of the Chair. Within a matter of minutes, additional members arrived and a quorum would have been available but Mr. PATMAN refused to reconvene the meeting.

These are the events, Mr. Speaker, which led to the committee session on October 19. From the very beginning the members of the committee who repeatedly have urged legislative action in the bank-merger field have done so because of their honest conviction that it is highly important to the entire financial community that the procedures be clarified which govern approval of proposed bank mergers.

Far more important than the legislative issue at hand is the question of whether majority rule is to be respected in the House of Representatives or, alternatively, whether a House committee is to be allowed to be treated by its chairman as his own private domain for whatever purposes he may choose. In my opinion, Mr. Speaker, the action by the House Members last Tuesday represents a forceful response both to this question and to the issue of bank-merger legislation.

APPENDIX D

There follows a physical comparison of the enacted bill with the Ashley-Ottinger Bill passed by the House Banking Committee on October 19, 1965. Where the text of the two bills is identical, normal printed type is utilized for both bills. Where additional text is found in the enacted bill, it is underlined. Where the language but not the sense of the Ashley-Ottinger Bill was changed in the Bank Merger Act, the two versions are italicized. Since no portion of the Ashley-Ottinger Bill was omitted, it was unnecessary to set up a fourth classification for deletions.

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(c)(1) Except with the prior written approval of the responsible agency, which shall in every case referred to in this paragraph be the Corporation, no insured bank shall—

(A) merge or consolidate with any noninsured bank or institution;

(B) assume liability to pay any deposits made in, or similar liabilities of, any non-insured bank or institution;

(C) transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured bank.

(2) No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank except with the prior written approval of the responsible agency, which shall be—

(A) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank;

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(c)(1) Except with the prior written approval of the responsible agency, which shall in every case referred to in this paragraph be the Corporation, no insured bank shall—

(A) merge or consolidate with any noninsured bank or institution;

(B) assume liability to pay any deposits made in, or similar liabilities of, any non-insured bank or institution;

(C) transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured bank.

(2) No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank except with the prior written approval of the responsible agency, which shall be—

(A) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank;

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(B) the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank);

(C) the Corporation if the acquiring, assuming or resulting bank is to be a nonmember insured bank (except a District bank).

(3) Notice of any proposed transaction for which approval is required under paragraph (1) or (2) (referred to hereafter in this subsection as a "merger transaction") shall, unless the responsible agency finds that it must act immediately in order to prevent the probable failure of one of the banks involved, be published—

(A) prior to the granting of approval of such transaction;

(B) in a form approved by the responsible agency;

(C) at appropriate intervals during a period at least as long as the period allowed for furnishing reports under paragraph (4) of this subsection, and

(D) in a newspaper of general circulation in the com-

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(B) the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank);

(C) the Corporation if the acquiring, assuming or resulting bank is to be a nonmember insured bank (except a District bank).

(3) Notice of any proposed transaction for which approval is required under paragraph (1) or (2) (referred to hereafter in this subsection as a "merger transaction") shall, unless the responsible agency finds that it must act immediately in order to prevent the probable failure of one of the banks involved, be published—

(A) prior to the granting of approval of such transaction;

(B) in a form approved by the responsible agency;

(C) at appropriate intervals during a period at least as long as the period allowed for furnishing reports under paragraph (4) of this subsection, and

(D) in a newspaper of general circulation in the com-

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munity or communities where the main offices of the banks involved are located, or, if there is no such newspaper in any such community, then in the newspaper of general circulation published nearest thereto.

(4) In the interests of uniform standards, before acting on any application for approval of a merger transaction, the responsible agency, unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved, shall request reports on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection. The reports shall be furnished within thirty calendar days of the date on which they are requested, or within ten calendar days of such date if the requesting agency advises the Attorney General and the other two banking agencies that an emergency exists requiring expeditious action.

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munity or communities where the main offices of the banks involved are located, or, if there is no such newspaper in any such community, then in the newspaper of general circulation published nearest thereto.

(4) In the interests of uniform standards, before acting on any application for approval of a merger transaction, the responsible agency, unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved, shall request reports on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection. The reports shall be furnished within thirty calendar days of the date on which they are requested, or within ten calendar days of such date if the requesting agency advises the Attorney General and the other two banking agencies that an emergency exists requiring expeditious action.

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(5) The responsible agency shall not approve—

· (A)¹ any proposed merger transaction which would result in a monopoly or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

¹ The total redundancy of this clause may be observed from the preservation of the violation of Section 2 of the Sherman Act already present in subsection 7(C), Section 2(a) and Section 2(b) of the Ashley-Ottinger Bill.

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(B) Any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

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Any merger transaction under this subsection unless it finds that such transaction will not violate the antitrust laws, except that in considering the application of the antitrust laws to merger transactions, the responsible agency, the Attorney General, and any court reviewing the legality of such transaction shall take into account the effect on the public interest and the community to be served of the following factors:

(A) The financial history and condition of each of the banks involved,

(B) The adequacy of its capital structure,

(C) Its future earnings prospects,

(D) The general character of its management,

(E) The convenience and needs of the community to be served, and

(F) Whether or not its corporate powers are consistent with the purposes of this act.

A merger transaction which tends to lessen competition may be approved where the probable adverse competitive effect thereof is clearly outweighed in the public interest by the probable effect of such transaction in meeting the convenience and needs of the community to be served.

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(6) The responsible agency shall immediately notify the Attorney General of any approval by it pursuant to this subsection of a proposed merger transaction. If the agency has found that it must act immediately to prevent the probable failure of one of the banks involved and reports on the competitive factors have been dispensed with, the transaction may be consummated immediately upon approval by the agency. If the agency has advised the Attorney General and the other two banking agencies of the existence of an emergency requiring expeditious action and has requested reports on the competitive factors within ten days, the transaction may not be consummated before the fifth calendar day after the date of approval by the agency. In all other cases, the transaction may not be consummated before the thirtieth calendar day after the date of approval by the agency.

(7) (A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under

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(6) The responsible agency shall immediately notify the Attorney General of any approval by it pursuant to this subsection of a proposed merger transaction. If the agency has found that it must act immediately to prevent the probable failure of one of the banks involved and reports on the competitive factors have been dispensed with, the transaction may be consummated immediately upon approval by the agency. If the agency has advised the Attorney General and the other two banking agencies of the existence of an emergency requiring expeditious action and has requested reports on the competitive factors within ten days, the transaction may not be consummated before the fifth calendar day after the date of approval by the agency. In all other cases, the transaction may not be consummated before the thirtieth calendar day after the date of approval by the agency.

(7) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under

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paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than Section 2 of the Act of July 2, 1890 (Section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial pro-

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paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order.

In adjudicating the propriety of any merger transaction, the Court shall apply the same rule of law that paragraph (5) directs the responsible agencies to apply when initially passing on the question.

Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial pro-

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ceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this subsection shall exempt any bank resulting from a merger transaction from complying with the antitrust laws after the consummation of such transaction.

(D) In any action brought under the antitrust laws arising out of a merger transaction approved by a Federal supervisory agency pursuant to this subsection, such agency, and any State banking supervisory agency having jurisdiction within the State involved, may appear as a party of its own motion and as of right, and be represented by its counsel.⁴

(8) For the purposes of this subsection, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1-7), the Act of October 15, 1914 (the Clayton Act, 15 U.S.C. 12-27), and any other Acts in pari materia.

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ceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this subsection shall exempt any bank resulting from a merger transaction from complying with the antitrust laws after the consummation of such transaction.

(8) For the purposes of this subsection, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1-7), the Act of October 15, 1914 (the Clayton Act, 15 U.S.C. 12-27), and any other Acts in pari materia.

⁴ This Subsection was not among the Reuss proposals.

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(9) Each of the responsible agencies shall include in its annual report to the Congress a description of each merger transaction approved by it during the period covered by the report, along with the following information:

(A) the name and total resources of each bank involved;

(B) whether a report was submitted by the Attorney General under paragraph (4), and, if so, a summary by the Attorney General of the substance of such report; and

(C) a statement by the responsible agency of the basis for its approval.

(b) Section 18 of such Act is further amended by adding at the end thereof the following new subsection:

(i)(1) No insured State non-member bank (except a District bank) shall, without the prior consent of the Corporation, reduce the amount or retire any part of its common or preferred capital stock, or retire any part of its capital notes or debentures.

(2) No insured bank shall convert into an insurance State

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(9) Each of the responsible agencies shall include in its annual report to the Congress a description of each merger transaction approved by it during the period covered by the report, along with the following information:

(A) the name and total resources of each bank involved;

(B) whether a report was submitted by the Attorney General under paragraph (4), and, if so, a summary by the Attorney General of the substance of such report; and

(C) a statement by the responsible agency of the basis for its approval.

(b) Section 18 of such Act is further amended by adding at the end thereof the following new subsection:

(i)(1) No insured State non-member bank (except a District bank) shall, without the prior consent of the Corporation, reduce the amount or retire any part of its common or preferred capital stock, or retire any part of its capital notes or debentures.

(2) No insured bank shall convert into an insurance State

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bank if its capital stock or its surplus will be less than the capital stock or surplus, respectively, of the converting bank at the time of the shareholder's meeting approving such conversion, without the prior written consent of—

(A) the Comptroller of the Currency if the resulting bank is to be a District bank;

(B) the Board of Governors of the Federal Reserve System if the resulting bank is to be a State member bank (except a District bank).

(C) the Corporation if the resulting bank is to be a State nonmember insured bank (except a District bank).

(3) Without the prior written consent of the Corporation, no insured bank shall convert into a noninsured bank or institution.

(4) In granting or withholding consent under this subsection, the responsible agency shall consider—

(A) the financial history and condition of the bank;

(B) the adequacy of its capital structure;

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bank if its capital stock or its surplus will be less than the capital stock or surplus, respectively, of the converting bank at the time of the shareholder's meeting approving such conversion, without the prior written consent of—

(A) the Comptroller of the Currency if the resulting bank is to be a District bank;

(B) the Board of Governors of the Federal Reserve System if the resulting bank is to be a State member bank (except a District bank).

(C) the Corporation if the resulting bank is to be a State nonmember insured bank (except a District bank).

(3) Without the prior written consent of the Corporation, no insured bank shall convert into a noninsured bank or institution.

(4) In granting or withholding consent under this subsection, the responsible agency shall consider—

(A) the financial history and condition of the bank;

(B) the adequacy of its capital structure;

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(C) its future earnings prospects;

(D) the general character of its management;

(E) the convenience and needs of the community to be served; and

(F) whether or not its corporate powers are consistent with the purposes of this Act.

Sec. 2(a) Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

(b) No merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated after June 16,

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(C) its future earnings prospects;

(D) the general character of its management;

(E) the convenience and needs of the community to be served; and

(F) whether or not its corporate powers are consistent with the purposes of this Act.

Sec. 2(a) Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

(b) No merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated after June 16,

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1963, and prior to the date of enactment of this Act and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this Act may be attacked after such date in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

(c) Any court having pending before it on the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in section 18(c)(5), *supra*, of the Federal Deposit Insurance Act, as amended by this Act.

(d) For the purposes of this section, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1-7), the Act of October 15, 1914 (the Clayton

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1963, and prior to the date of enactment of this Act and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this Act may be attacked after such date in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

(c) Any court having pending before it on the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in section 18(c)(5), *supra*, of the Federal Deposit Insurance Act, as amended by this Act.

(d) For the purposes of this section, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1-7), the Act of October 15, 1914 (the Clayton

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Act, 15 U.S.C. 12-27), and any other Acts in pari materia.

Sec. 3. Any application for approval of a merger transaction (as the term "merger transaction" is used in section 18(c) of the Federal Deposit Insurance Act) which was made before the date of enactment of this Act, but was withdrawn or abandoned as a result of any objections made or any suit brought by the Attorney General, may be reinstituted and shall be acted upon in accordance with the provisions of this Act without prejudice by such withdrawal, abandonment, objections, or judicial proceedings.*

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Act, 15 U.S.C. 12-27), and any other Acts in pari materia.

* This section was also not included among the Reuss proposals.

APPENDIX E

[Filed Oct. 6, 1966]

Civil Action No. 41,808

**UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

UNITED STATES OF AMERICA, Plaintiff

VS.

**CROCKER-ANGLO NATIONAL BANK, CITIZENS NATIONAL BANK,
and TRANSAMERICA CORPORATION, Defendants**

Opinion and Order

**Before POPE, Circuit Judge, SWEIGERT and ZIRPOLI, District
Judges.**

POPE, Circuit Judge.

On May 13, 1963, some 34 days prior to the decision of the United States Supreme Court in *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, (June 17, 1963), the Crocker-Anglo National Bank of San Francisco and Citizens National Bank of Los Angeles applied to the Comptroller of the Currency for permission to merge, under the charter of the former, with the title "Crocker-Citizens National Bank". After notice and public hearing held July 30 and 31, 1963, and receipt of some 1605 pages of testimony and exhibits, the Comptroller, on September 30, 1963, made a decision approving the proposed merger, subject to certain named conditions, based on his findings including the finding that the proposed merger would promote the public interest. The approval was to be effective on or after November 1, 1963. On October 8, 1963, this suit was filed attacking the proposed merger as unlawful under § 7 of the Clayton Act, (15 USC § 18) and § 1 of the Sherman Act, (15 USC § 1). A certificate under the Expediting Act

(15 USC § 28) was filed and pursuant thereto a three-judge court was named and assembled for the purpose of hearing the cause. The Government's application for a preliminary injunction was denied (*United States v. Crocker Anglo Nat. Bank*, 223 F. Supp. 849) and after completion of extensive pretrial proceedings and the making of a pretrial order the cause came on for trial on the merits. The trial began June 1, 1965 and the taking of testimony was concluded on June 18, 1965 with orders fixing the time for filing of briefs and proposed findings by the parties.

While the court was thus in the process of hearing testimony, on June 11, 1965 the Senate passed, with no opposing vote, its S. 1698, a bill under whose provisions, if enacted, this case would have become moot, for, as stated in the report accompanying the bill, the bill "would free the banks involved in such suits from further proceedings under the anti-trust laws." Whether it was because of their knowledge of the pendency of this legislation or otherwise, counsel by stipulation postponed the final filing of briefs and proposed findings until shortly before the passage of this proposed legislation, as amended in the House on February 9, 1966. The enactment, designated Public Law 89-356, 80 Stat. 7, was signed by the President on February 21, 1966.

The court was thus confronted with a somewhat extraordinary situation in which the law applicable to the case was changed after the testimony had been received and the cause submitted for decision. The measure, as finally enacted, made specific reference to this and other cases similarly situated in § 2(c) thereof which provides as follows: "Any court having pending before it on or after the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in section 18(c)(5) of the Federal

Deposit Insurance Act, as amended by this Act.”¹ The so-called “substantive rule of law set forth in § 18(c)(5)” is stated in the Act as follows: “(5) The responsible agency shall not approve—

(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served.”

That language refers to the tests to be applied, in a case of this type, by the Comptroller of the Currency in passing upon an application for approval of a proposed bank merger. Not only did §2(c), quoted above, specifically direct that this court, in respect to this case, “shall apply the substantive rule of law set forth in §18(c)(5) but §18(c)(7)(B) provided as follows: “In any judicial proceeding attacking

¹ It was noted in the congressional debates that this section referred to three so-called “post Philadelphia cases—in Nashville, San Francisco and St. Louis—where mergers were consummated after that [Philadelphia] decision.” This is the San Francisco case there referred to. The Philadelphia case referred to is *United States v. Philadelphia National Bank*, 374 U.S. 321. In that connection reference was also made to *United States v. First Nat. Bank*, 376 U.S. 665.

a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than §2 of the Act of July 2, 1890 (§2 of the Sherman Antitrust Act, 15 U.S.C. 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)."

After a special hearing conducted for that purpose evidence was received and the parties were granted time within which to file further briefs and memoranda expounding their views as to the action which the court should take in the light of the entire testimony and in view of the new enactment.

It is the Government's view that the new statute made no substantial change in the law or standards to be applied in passing upon the issues here presented. The Government puts it thus: "It is, of course, the essential position of the Government . . . that the 1966 amendment to the Bank Merger Act (P.L. 89-356; 80 Stat. 7) has not resulted in substantial change in substantive antitrust law or in the standards used by the courts in determining the legality of bank mergers."

The new enactment does pose some difficult questions which we shall note hereafter. But we find no difficulty in concluding that the new enactment made substantial changes in the substantive law and in the standards to be applied in this case. Not only the language of the enactment but its legislative history is very compelling on this point. As we have noted, both §2(c) and §18(c)(7)(B), quoted above, specifically direct the court in this situation to apply the new standards of this Act. (The latter refers to the standards "directed to apply under paragraph 5" and §2(c) and refers to these as "the substantive rule of law," set forth in that section.) It would be a bit startling to assume that in making this enactment, over which the congressional committees struggled long and hard, the Congress had turned up with nothing of substance, or had

accomplished no change in respect to the law applicable for testing the validity of bank mergers.

The legislative history of the Act most emphatically contradicts the position now taken by the Government. The Senate Committee report, which accompanied the introduction of the bill in the Senate, took note of what Congress had contemplated would be the result of the Bank Merger Act of 1960. The Committee stated: "At that time it was clearly expected that the decision of the responsible Federal banking authority, based on its own investigation and on reports on competitive factors from the other two banking agencies and from the Department of Justice, would be final and conclusive. The Attorney General's report was expected to be advisory only." The report states that the uncertainty created by the situation resulting from the Philadelphia and the Lexington bank cases (*supra*, note 1) "is harmful to the banking industry and to its customers. . . . There was unanimous agreement by all the witnesses that the present situation was undesirable and should be changed." The House Committee report states clearly the intent to make changes in the law as follows: "The intended legal effect of the bill is to modify the foregoing provision in three respects:

First, it is intended to make clear that no merger which would violate the antimonopoly section (sec. 2) of the Sherman Anti-Trust Act may be approved under any circumstances.

Second, the bill acknowledges that the general principle of the antitrust laws—that substantially anticompetitive mergers are prohibited—applies to banks, but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served—recognizing that effects outside the section of the country involved may be relevant to the capacity of the institution to meet the convenience and needs of the community to be served—that it would be in the public interest to permit it.

Third, the bill provides that this rule of law is to be applied uniformly, in judicial proceedings as well as by the administrative agencies."

The most complete exposition of the congressional view in the process of this enactment is to be found in the remarks of Senator Robertson at the time the bill, as amended to conform to the House Committee report, came back to the Senate. At that time Senator Robertson, who was Chairman of the Senate Committee which had charge of the bill and who originally introduced the bill in the Senate, was recommending that the Senate accept the House amendment. No member of Congress had remained in closer touch with the bill's progress through both Houses than Senator Robertson. As he put it: "I have lived with this problem day and night for months. I am convinced that we have a good bill." What he then had to say expounded at considerable length the ideas which had been expressed by various House members during consideration of the bill in the House.*

* Representative Ashley, one of the members principally in charge of the bill in the House, stated (Cong. Rec. Feb. 8, 1966, p. 2339): "The bill would require the court to use the new standards of the bill in all . . . 'post Philadelphia' cases now pending in court. . . . The courts have repeatedly held that under the antitrust laws the social and economic benefits of a given merger cannot even be considered." The Congressman then quoted from the statement to that effect in the Philadelphia case: "It is a primary purpose of the bill to assure that the courts will never again dismiss as irrelevant the question of the needs of a community. . . . [T]he merger must be shown to be sufficiently beneficial in meeting the needs of the community to be served that, on balance, it may properly be regarded as in the public interest." During the same discussion Rep. Stanton, a member of the committee in charge of the bill, (Cong. Rec. Feb. 8, 1966, p. 2343) stated: "[I]t was the expressed purpose and intent of Congress when it passed the Bank Merger Act in 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies, and that while the competitive effects of a proposed merger should be considered, they were not

Senator Robertson said unequivocally that the purpose of the bill was to "reverse a decision of the Supreme Court." He said (Cong. Rec. Feb. 9, 1966, p. 2538): "The bill will end the confusion and controversy which has surrounded the bank merger situation since the ill-advised and unfortunate decisions of the Supreme Court in the Philadelphia and Lexington cases and the district court decision in the New York case which followed those precedents. It will do this by establishing a uniform rule for the bank supervisory agencies and the courts to follow in bank merger cases: a rule which takes into account both the competitive factors on which the antitrust laws are based—for banks these were written into the Bank Merger Act of 1960—and the convenience and needs of the public to be served by the proposed merged bank." Referring to the pendency of the suit now before us, he said: "It would permit the continuance of proceedings against the three 'post-Philadelphia' cases—in Nashville, San Francisco, and St. Louis—where mergers were consummated after that decision, but in these three cases the courts would be directed to follow the new statutory standards laid down in the statute for all mergers to be considered in the future."

to be given a predominant position. These standards were repudiated by the Supreme Court in the Philadelphia National Bank and the Lexington Bank cases in which the Court decided that the Justice Department had the final say in bank mergers. Contrary to the intent of Congress, the bank regulatory authorities were relegated to advisory roles.

These provisions . . . reinstate a measure of antitrust consideration which was lacking in the Senate bill, and they provide a banking standard that may allow economic assistance to a community even though a merger tends to lessen competition in that community. It is this statutory balance that was intended in 1960. . . .

The . . . bill . . . directs the courts to apply the banking standards as well as the competitive standards in any judicial proceeding attacking an approved merger transaction . . . it . . . gives these standards equal weight as between economic and competitive circumstances and it assures this equilibrium throughout the entire review procedure."

And in a prepared statement which he incorporated in the record as a part of his remarks he said of the bill: "It will strike the Philadelphia, Lexington, and New York decisions and opinions from the books."³

Perhaps the most conclusive evidence of the fact that this Act alters the previous rules comes from a comparison of the language of this statute with what the Supreme Court

* In an effort to find some legislative history to bolster its position that this Act made no changes in the law, the Government has inserted in its brief some quotations from the remarks of individual Congressmen during floor debate. Taken out of context, as they are, they prove nothing. It is true that the wording of § 18(c)(5) emphasized and restated the requirement that the Comptroller, and the reviewing courts, take into consideration the antitrust laws. This was noted in debate, but it was also noted that this Act definitely and positively added a new standard. As stated in the House Report of Supplementary views of Congressman Ottinger who helped draft the bill: "It also assures that banking services available to meet the convenience and needs of a community are considered in all cases and will prevail where they clearly outweigh nonmonopolistic anti-competitive effects of a merger."

Counsel's quotations from the debate ignore the rule stated in *Duplex Co. v. Deering*, 254 U.S. 443, 474-475, as follows: "By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the lawmaking body. . . . But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. . . . And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage." Counsel have largely confined their quotations to those from Congressman Weltner and Todd, who opposed the bill, and from Congressman Patman who bitterly fought the legislation and finally, through a face-saving compromise, introduced the bill, while stating that if he alone were writing the bill, he "would be against it as a matter of principle." (Cong. Rec. Feb. 8, 1966, p. 2357.) Counsel's choice of makers of remarks is not very persuasive.

said in the Philadelphia case, namely, that a bank merger such as that one "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." Section 18(c)(5), quoted above, expressly requires a consideration of similar factors thus rejected in Philadelphia.

This statute makes a further alteration in the nature of the proceeding now before us. After providing for the time of commencement of an action brought under the antitrust laws arising out of a merger transaction, §18(c)(7)(A) stipulates: "In any such action, the court shall review *de novo* the issues presented." Returning now to the provisions of §2(c), requiring this court to "apply the substantive rule of law set forth in §18(c)(5)," and to §18(c)(7)(B), reciting that in any judicial proceeding attacking a merger transaction approved under paragraph 5, "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph 5," it seems clear that what we are now called upon to do is to review a decision and determination of the Comptroller of the Currency.

To what extent that review can be "*de novo*," we shall have occasion to discuss hereafter. The immediate difficulty now presented is that the prior decision of the Comptroller of September 30, 1963, was not made under, or in the light of the new Bank Merger Act of 1966.

It is true that the Comptroller then found that the proposed merger "will promote the public interest," using the language of the 1960 Act, but his determination did not contain findings covering the precise issues required to be determined by him under the language of §18(c)(5) quoted above. Under that section it would be incumbent upon the Comptroller to determine whether any anti-competitive effects of the proposed merger were "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." We apprehend that an appropriate finding would specify in what respect the transaction would

meet the convenience and needs of the community to be served.

There is another respect in which the earlier finding of the Comptroller may be inadequate and out-dated. His decision of September 30, 1963, antedated the decisions of the Supreme Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, decided April 6, 1964, and *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, decided June 22, 1964. In those cases the Supreme Court developed, to an extent not previously announced, the doctrine that §7 of the Clayton Act is designed to preserve not merely present but potential competition in the market in question. This is the doctrine of the application of §7 to potential competition. The principal argument made by the Government here relates to alleged elimination by the merger of *substantial potential competition* in the State of California.

The Act requires this court to proceed in this case in the same manner in which it would have to deal with some future proposed merger. Before we can perform the required function of reviewing the action of the Comptroller, the matter must be remanded for the consideration of the Comptroller under the provisions of the 1966 Act, a proposition we shall discuss hereafter.

Plainly enough the Act is designed to set-up precise rules under which the validity of proposed bank mergers may be ascertained and determined. The first required step is the application to the Comptroller of the Currency⁴ for written approval of the proposed merger. Upon hearing on such an application the Comptroller is directed to act upon the considerations set forth in §18(c)(5) above referred to. Then, as indicated, if an action be brought attacking the merger transaction, it must be brought within a

⁴ It is this officer who must act if the acquiring, assuming or resulting bank is to be a national bank. Where a state bank is to be the resulting one, the decision is to be made by the Board of Governors of the Federal Reserve System. In other cases, the Federal Deposit Insurance Corporation is to make the decision.

limited time and in any such action "the court shall review *de novo* the issues presented." Thus the Act contemplates initial action by the Comptroller followed by a review at the instance of the Department of Justice.

When we face the task of complying with these requirements we are confronted with a difficulty arising out of the fact that the Act provides that this review shall be "*de novo*."

It will be noted that under §5 the Comptroller is charged with ascertaining two sets of facts. The first is whether the effect of the proposed merger transaction "in any section of the country may be substantially to lessen competition" and the second, whether, having found that there would be anti-competitive effects in the proposed transaction, those effects "are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

No difficulty would be presented here so far as reviewing *de novo* the first of these determinations for this court has traditionally adjudged whether mergers have anti-competitive effects. But the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding.

* It will be noticed that the standards of § 5 are to be applied in granting or refusing leave to merge in the future. The contemplated action "looks to the future and changes existing conditions by making a new rule to be applied thereafter to . . . some part of those subject to [the Comptroller's] power," as fully as the establishment of railroad rates in *Prentiss v. Atlantic Coast Line*, 211 U.S. 210, 226. It involves a determination and establishment of a public policy.

See Finfrock, "Trial de Novo—Panacea?" in 14 *Baylor Law Review*, 135, where the Texas cases are discussed: "This criterion

The jurisdiction of this court is limited to cases and controversies as that term is used in Article III of the Constitution. As stated in *Keller v. Potomac Electric Co.*, 261 U.S. 428, 444, "legislative or administrative jurisdiction cannot be conferred" on a court such as this. This court, as well as the Supreme Court, "was brought into being by the judiciary article of the Constitution, is invested with judicial power only and can have no jurisdiction other than of cases and controversies falling within the classes enumerated in that article. It cannot . . . exercise or participate in the exercise of functions which are essentially legislative or administrative." *Radio Comm. v. General Electric Co.*, 281 U.S. 464, 469. See also *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, where it was held that the authority of the Court of Appeals to affirm, modify or set aside an order of the Federal Power Commission did not include the power to exercise an essentially administrative function by determining what conditions should attach to a power license. We find an expression of the views of the Supreme Court on the precise question here involved in *United States v. Philadelphia Nat. Bank*, *supra*, at page 371. This view is to be found in the words which we have italicized in the following quotation: "We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. *A value choice of such magnitude is beyond the*

in essence classifies as administrative and non-judicial decisional functions which courts are not particularly equipped to decide while leaving to the courts that category of decision making with which it has traditionally dealt and is equipped to handle under the adversary type of judicial procedure. Decisions that require the inquisitorial type of procedure, investigative in nature, and which must, to attain optimum utility, be based upon a mosaic of expert opinion, judgment, and decisions are and should be regarded as non-judicial and left primarily to the administrators. They are far more able to come to grips with such problems than a court or jury in the detached and sterile atmosphere of the courtroom." (p. 160)

ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended §7. Congress determined to preserve our traditionally competitive economy." (*Italics ours*)

This does not mean that the administrative order of an agency or commission may not be reviewed in a judicial proceeding in a constitutional court; but such a review is necessarily limited to the determination of questions of law and the ascertainment of whether findings of fact by the agency are supported by substantial evidence. *Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266, 275 to 276. As stated in *Seaboard Air Line R. Co. v. U.S.*, 382 U.S. 154, 157, the question to be decided is "Whether the Commission has confined itself within the statutory limits upon its discretion and has based its findings on substantial evidence. . . ."

Since it is plain that this court cannot be invested with power to make an original and independent determination as to whether anti-competitive effects are "outweighed in the public interest" or what are the "convenience and needs of the community to be served" we are confronted with the question whether this Act's provision for review *de novo* must be held null and void and therefore wholly disregarded.

We do not think so. There are certain general principles relating to construction of statutes which should aid us here. In *U.S. v. Amer. Trucking Ass'ns.*, 310 U.S. 534, 543, the Court said: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable

one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

In the case before us the use of the words "de novo," as we have noted, may have full significance in respect to this court's review of the Comptroller's determination of the existence or nonexistence of anti-competitive effects by the merger. But the language of the Act would lead to absurd and futile results if it were construed as requiring this Court to substitute its judgment for the findings of the Comptroller dealing with the public interest and the convenience and needs of the community. This court cannot validly be invested with power to make such a decision which, as we have noted, is plainly legislative or administrative in character. If we look to the purpose beyond the statute and to the policy of the legislation as a whole we must conclude that Congress has framed an Act which contemplates, as an important part thereof, provisions for review of the Comptroller's action.

Other courts have had occasion to deal with an identical problem arising from the use of the words "de novo" in state statutes providing for court reviews of administrative or legislative determinations. In those cases the courts have been confronted with difficulties comparable to those present here, some of them stemming from their constitutional provisions for separation of powers. Thus in *Household Finance Corp. v. State*, 40 Wash. 2d 451, 244 P. 2d 260, 264, the court, after holding invalid an attempt to vest a non-judicial power in a constitutionally created court, said: "We recognize that there is a wealth of authority to support respondent's position that where the only review of an administrative order that is constitutionally possible is on the question of whether the administrative body or officer acted arbitrarily, capriciously, or in violation of law, it will be held that a provision for a trial *de novo* means only that the appellate or reviewing court will be limited to a consideration of that particular question on

the trial *de novo*. The basis for such holdings is the rule that when a statute is subject to two possible constructions, one of which will render it constitutional and the other unconstitutional, the legislature will be presumed to have intended a meaning consistent with the constitutionality of its enactment." (244 P. 2d 264).

A like decision was made by the Supreme Court of Indiana in *State Board v. Scherer*, 221 Ind. 902, 46 N.E. 2d 602, 604, where the court said: "It is true that the statute here in question seems to contemplate a *de novo* proceeding before the court, and a finding of 'guilty' or 'not guilty,' but, regardless of what may seem a legislative intention to the contrary, this court has consistently construed similar statutes as vesting in the courts only such jurisdiction as the Constitution permits."

The same problem confronted the Supreme Court of Texas in *Jones v. Marsh*, 148 Tex. 362, 224 S.W. 2d 198. In that case the court was called upon to review an order made upon an application for a license to sell beer. The statute provided for an appeal and that such proceeding on appeal "shall be *de novo* under the same rules as ordinary civil suits." The court said (p. 201): "The statute does not expressly provide that there shall be in district court a full retrial of the facts as if there had been no findings made by the county judge, nor does the statute specify what issue or issues shall be tried in the district court. It may, therefore, reasonably be concluded, in view of the subject matter involved and the nature of the order to be reviewed, that only a limited review is intended, and that in so far as the facts which are the basis for the order of the county judge are concerned the question or issue to be determined in the district court is whether or not the findings of the county judge are reasonably supported by substantial evidence. Such a trial is one kind of a trial *de novo*, and the somewhat limited trial can be held, as the statute requires, under the rules applicable to ordinary civil suits." In other words, the sort of trial which the court could val-

idly hold on review of an administrative order was held to be "one kind of a trial de novo."^{*}

It seems reasonable to say that there may be a special kind of review *de novo* involved here, namely, a review involving greater exercise of our judgment in respect to the question of anti-competitive effects, and a review, more limited under the so-called substantial evidence rule, of the Comptroller's determination of weight of public interest and of the character of the needs and convenience of the community.

Another general principle may therefore be applied here. Since the language of the Act could properly be construed to intend the special kind of *de novo* review just referred to, we can "apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law.'" *Anniston Mfg. Co. v. Davis*, 301 U.S.

^{*} A like problem was solved in a similar manner in *De Mond v. Liquor Control Commission*, 129 Conn. 642, 30 A.2d 547, 549, where the court said: "Upon these appeals the court hears and considers all pertinent matters for the purpose of reaching an intelligent conclusion as to the legal propriety of the action of the commissioners. In this qualified sense, but in no other, is its hearing one de novo." Another approach to a similar problem was made in *American Beauty Homes Corp. v. Louisville, etc.*, — Ky. —, 379 S.W. 2d 455, where the court held that "the statute was invalid with respect to the trial 'de novo' but still permitted an aggrieved party to appeal. This also was the ruling in *California Co. v. State Oil and Gas Board*, . . . heretofore cited. We think the 'de novo' provision of KRS 100.057 is clearly severable from the rest of this statute."

337, 351, 352. See also *Labor Board v. Jones & Laughlin*, 301 U.S. ¶ 30, and *Ex Parte Ende*, 328 U.S. 283, 299.⁷

It is plain to us that the congressional purpose here was to provide for an initial decision by the Comptroller and that the action brought by the Department of Justice should be deemed an action to review that decision. It is noteworthy that the section of the statute which uses the term "de novo" does not speak of a trial de novo but of a *review de novo*.

The legislative scheme here, in our view, resembles that which is more elaborately spelled out in those sections of the Interstate Commerce Act which were discussed in the recent case of *Seaboard Air Line Co. v. United States*, 382 U.S. 154.⁸ In that case the three-judge district court had set aside a commission's order approving a railroad merger on the ground that the commission had not adequately determined whether the merger violated §7 of the Clayton Act. The Court said: "By thus disposing of the

⁷ In *United States v. Philadelphia Nat. Bank*, *supra*, the Court was confronted with a difficulty arising out of the language of §7 of the Clayton Act. The Court recognized merit in the contention of the appellees that the merger there involved an assets acquisition and hence that §7 had no application since the Federal Trade Commission had no jurisdiction over banks. The Court said (p. 337): "Since the literal terms of §7 thus do not dispose of our question, we must determine whether a congressional design to embrace bank mergers is revealed in the history of the statute." The Court's final conclusion was based upon what it found to be a "plain congressional purpose."

⁸ During the debate in the House Congressman Moorhead, one of the members of the committee most actively in charge of the bill, cited and quoted from the *Seaboard Air Line* case, and also from *McLean Trucking Co. v. U. S.*, 321 U.S. 67, 87, as appropriate precedents for his point: "In the banking industry the public interest is represented and protected by a regulating body. In mergers in such a situation the custom is that the validity of a merger should be determined not exclusively by the competitive factors, but that the regulating body should also consider the public interest." Cong. Rec. February 8, 1966, p. 2340.

case the District Court did not reach the ultimate question whether the merger would be consistent with public interest despite the foreseeable injury to competition." The Court referred to its decision in *Minneapolis & St. Louis R. Co. v. United States*, 361 U.S. 173, 187, where the Court described the impact of congressional legislation by saying "Even though such acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them, if it finds they are in the public interest. . . . It must be presumed that, in enacting this legislation, Congress took account of the fact that railroads are subject to strict regulation and supervision. 'Against this background, no other inference is possible but that, as a factor in determining the propriety of [railroad acquisitions] the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy.'" The Court continued "Resolution of the conflicting considerations 'is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.'" 79 Cong. Rec. 12207. "The wisdom and experience of that commission," not of the courts, must determine whether the proposed [acquisition] is "consistent with the public interest." . . ."

The action of the Supreme Court in those cases dealing with the right of the Interstate Commerce Commission to approve a merger notwithstanding its anticompetitive effects, and particularly the language above quoted from the *Seaboard Air Line* case, would seem to make negative another argument of the Government. This is that the language of §18(c)(5) referring to the "convenience and needs of the community to be served" is but a reiteration of the "failing company doctrine" long recognized as "an

integral part of settled antitrust law" No such limiting suggestion was ever made in the Seaboard Air Line and the other cases dealing with the same statute. In our view it would be absurd to find that the new standards so carefully framed for the 1966 Bank Merger Act were no more than the inclusion of a wholly unnecessary reference to the "failing company doctrine." There is not the slightest indication in the language of the Act, or in its legislative history, to support the Government's effort thus to cancel or dissipate the declared purpose of the Act. During the debate on the bill, the question of the situation of the failing bank was mentioned, and in a colloquy between Congressman Weltner, who opposed the bill, and Congressman Multer, who supported it, it was made plain that the language referred to was not limited to the failing bank situation.*

The careful and precise description of this portion of the bill, made by Senator Robertson to the Senate as the latter body prepared to accept the House version, would

* After Congressman Multer had given an illustration of how this language would apply in a case not involving a failing bank, the following colloquy occurred:

"Mr. Weltner. This is a case of a failing bank, which has long been recognized by the court. It has nothing to do with this legislation. I am sure the gentleman from Wisconsin will agree with me, that we do not have to pass any bill to permit the approving agency to merge a failing bank in order to save it from insolvency. I am certain that the gentlemen from New York, indeed, would say, as a well-educated lawyer, that the failing bank doctrine exists independently of any statutes which has been passed in the last 20 or 30 years. I yield to the gentleman for the purpose of responding to the correctness of that proposition.

Mr. Multer: The gentleman is correct as far as he goes, but I have gone beyond the failing bank theory. There are many instances where we are not concerned with the failing bank, where there is an absolute and complete diminution of competition, yet under all the circumstances and all of the factors the courts should approve that merger just as the regulatory agencies may approve the merger."

Cong. Rec. Feb. 8, 1966, p. 2346.

clearly negative any suggestion that it was limited to the failing company situation.¹⁰

A final answer to the Government's "failing company" theory is found in the House Report's indication as to the limited extent of the use of financial resources of the affected banks. That report states (U.S. Code, Cong. and Administrative News, 89th Cong. 2d Session, p. 337): "However, only the convenience and needs of the community to be served can be weighed against anticompetitive effects, with financial and managerial resources being considered only as they throw light on the capacity of the existing and proposed institutions to serve the community."

One problem which we confront in this particular case is how we shall apply the rules which are prescribed in the Act. In the case of future mergers the method of procedure and the application of the statutory requirements is quite simple. First, the banks seeking to merge will make their application for approval to "the responsible agency" in a case of this kind, the Comptroller of the Currency. The agency will then hold the hearings and make the determination contemplated by §18(c)(5) of the Act which, as

¹⁰ He said: "... this bill, should convince the courts that the Congress does not intend that mergers in the banking field should be measured solely by the antitrust considerations which are applied in other industries." (Cong. Rec. Feb. 9, 1966, p. 2541.) In short, something apart from the older antitrust considerations, (including the failing company rule) are imported here. He also said (p. 2542): "The courts will no longer be able to say—in the case of a merger which does not reach to the point of creating a monopoly—that proof that a merger will have demonstrable benefits or will be benign is irrelevant. On the contrary, the question whether there are or are not demonstrable benefits—whether the merger is benign or malignant—will be the heart of the issue." Again he said (p. 2542): "The effect of the merger on the public interest and on the convenience and needs of the community to be served must be measured in specific and realistic terms in the light of the kinds of business involved and the kinds of people being served. The banking agencies and the courts must be guided by the realities of the industrial, commercial, and financial worlds. They must look through theories and percentages and doctrines to the hard facts of life."

we have indicated, calls for two determinations—whether the merger will have a tendency substantially to lessen competition and whether the anti-competitive effects, if found, are clearly outweighed in the public interest by the probable effect of the transaction in meeting the needs and convenience of the community to be served.

The Act then provides that any action brought under the antitrust laws arising out of this merger transaction shall be commenced within a short period following the Comptroller's approval and in this judicial proceeding "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under §5." Also, in any such action, the court is required to review in the manner we have mentioned, the issues presented. The Act, making reference to this, and other cases initiated after June 16, 1963, with respect to a merger consummated after that date, requires us to apply the same substantive rule of law that we would apply in the case of any future merger.

Here, however, the merger is already accomplished; it was accomplished pursuant to a September 30, 1963, approval by the Comptroller who purported to act under the provisions of the 1960 Bank Merger Act. That Act, as demonstrated by the decision of the Court in *Philadelphia Bank*, supra, was without force and effect, and the Comptroller's decision of September 30, 1963, cannot, we think, be the equivalent of a determination by him under the 1966 Bank Merger Act or in accordance with §18(c)(5) thereof. The question is whether we may now require the Comptroller to proceed under the new Act and to make the determination called for by the last mentioned section preliminary to our further consideration of the same and a review thereof.

We think that the decision in *United States v. Morgan*, 307 U.S. 183, furnishes a precedent.¹¹ The Court upheld

¹¹ In that case the Secretary of Agriculture made an order reducing stockyards rates. After those rates had gone into effect the Supreme Court set aside the order of the Secretary because of procedural defects and the cause was remanded to the district court

the right of the Secretary of Agriculture to make an order going beyond fixing rates for the future, stating that he was "now free to determine a reasonable rate for the period antedating the order he may now make," that is to say, during a period following his former invalid order. The Court noted the duty of the administrative agencies and of the courts judicially reviewing their action to coordinate their actions in order to secure the plainly-indicated objects of the statute.

We think that in this case this court cannot as a practical matter apply the substantive rule of law set forth in §18(c)(5) of the Act unless it has before it for review an order of the Comptroller made pursuant to the requirements of that section. Not only because we are here required to review an administrative order as a part of our consideration of this case, but also because the Comptroller has made himself a party to this proceeding and subject to our orders, we shall now remand the cause to the Comptroller with directions to proceed to make the determinations called for by the Bank Merger Act of 1966. This we think to be appropriate in view of the requirements of the Act notwithstanding the actual merger has been completed.

This remand is predicated upon the assumption that after a new order has been made by the Comptroller, we will be able to review the same. As we have indicated, our power to review any determination as to the anti-competi-

for further proceedings. The Court stated that it would not attempt to forecast what further proceedings the Secretary might see fit to take. The district court which had entered a temporary restraining order enjoining the enforcement of the Secretary's order had required the excess charges collected by the stockyards over and above the amount prescribed by the Secretary to be deposited with the court pending final determination of the case. The Secretary then reopened the original proceedings and pending these proceedings the district court granted the appellees' motion to distribute the fund mentioned among them. This decision was based upon a ruling that the Secretary did not have authority to make an order prescribing rates and charges effective as of the date of his original order.

tive effects will allow a greater exercise of our own judgment, than our power to review a determination as to whether the anti-competitive effects, if any, are clearly out-er the anti-competitive effects, if any, are clearly outweighed in the public interest and as to the effect of the transaction in meeting the needs and convenience of the community to be served. In making his determination the Comptroller should make specific findings as to the competitive situation as to which the merger may have operative effects and particularly whether the merger will have a probable tendency to lessen or do away with potential competition.

In passing upon the question of the probable effect of the transaction in meeting the needs and convenience of the community to be served, the Comptroller should specify particularly what he finds to be the convenience and needs of the community, what he considers will be the effect of the merger thereon, and how and by what means he weighs these effects as against the anti-competitive effects of the transaction. Furthermore, in order to avoid any possible necessity for further remand following our review of the Comptroller's order, he is directed to make a finding as to whether, assuming that the merger has the effect upon potential competition which the Government claims, that effect would be outweighed in the public interest by the probable effect of the transaction in meeting the interest and convenience of the community to be served.¹²

In holding that our function now, under the 1966 Act, is to review an appropriate order of the Comptroller, we are disapproving other alternatives. One alternative would be to hold that we must disregard any suggestion for a review and simply decide the case on the evidence now before us, applying directly the standards set forth in §18(c)(5). Such, we think would not be consonant with

¹² Note the usefulness of findings based on assumptions made by the district court in *United States v. Philadelphia Nat. Bank*, supra, at p. 335 of 374 U.S.

the clear purpose and intent of the Act. Plainly the whole intent was that there should be made available determining the validity of bank mergers the expertise of persons familiar with banking and with the operating procedures of banks. Not only is this court constitutionally without power to evaluate such features of the "probable effect of the transaction in meeting the convenience and needs of the community to be served," but we lack the informed experience properly to apply such tests.

To deny the banks involved in these three "post-Philadelphia" actions the benefits of these banking-economic tests by specialized agencies would run counter to what the legislative history of the Act indicates was the attitude of Congress toward these three mergers. As the bill first came from the Senate it would have provided that this merger "shall be exempt from the antitrust laws." In its final form the bill exempted only the pre-Philadelphia mergers. But the bill would, as Senator Robertson stated, "permit the continuance of proceedings against the three post-Philadelphia cases—in Nashville, San Francisco, and St. Louis—where mergers were consummated after that decision, but in these three cases the courts would be directed to follow the new statutory standards laid down in the statute for all mergers to be considered in the future." Surely Congress was not swinging from a most favorable treatment of this merger to an opposite extreme of denying it the expertise contemplated for all mergers in the future.

Another holding, in the alternative, would be that since this court cannot validly entertain a question as to "the probable effect of the transaction in meeting the convenience and needs of the community to be served," the requirement that we "shall apply the substantive rule of law set forth in §18(c)(5)" must be held inoperative and disregarded, and therefore this action must proceed as if the Act had not been passed. Such an unnecessary and uncalled for disregard of the obvious purpose and intent of the Act is unthinkable.

We anticipate that the defendant banks will suggest that we should simplify this whole matter by finding now, once and for all, that the claimed adverse affect upon competition has not been established and that the merger will not have the effect either substantially to lessen competition, whether actual or potential, or to tend to create a monopoly or operate in restraint of trade. But, as indicated in *Seaboard Air Line R. Co.*, supra, that is not the ultimate question to be determined in this litigation, and we shall not invite a repetition of the error corrected in that case.

It is therefore ordered that further proceedings herein shall be stayed pending the further consideration by the Comptroller, in the manner hereinabove indicated, of the questions required to be passed upon under §18(c)(5). In reaching his determination the Comptroller will, of course, give the notices and provide the opportunity for hearing contemplated by the Act. We assume the parties will assist in shortening the proceedings by agreeing that the Comptroller may consider the evidence adduced at our last hearing, as well as that at his first hearing, particularly in view of the rule that administrative agencies have never been restricted by the rigid rules of evidence. *Trade Comm'n v. Cement Institute*, 333 U.S. 705; cf. *Davis*, *Administrative Law*, vol. 2, §14.08.

Upon certification to this court of the proceedings of the Comptroller, this court shall proceed in such manner as may be called for by the Comptroller's decision.

IT IS SO ORDERED.

This opinion contains the court's findings and conclusions.

/s/ WALTER POPE
United States Circuit Judge

/s/ W. T. SWEIGERT
United States District Judge

/s/ ALFONSO J. ZIRPOLI
United States District Judge

APPENDIX F

[Received Nov. 22, 1966]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

UNITED STATES OF AMERICA, *Plaintiff*

v.

THIRD NATIONAL BANK OF NASHVILLE and NASHVILLE BANK
AND TRUST COMPANY, *Defendants*

and

THE COMPTROLLER OF THE CURRENCY, *Intervenor*

Civil Action No. 3849

Opinion

This action was instituted August 10, 1964 by the United States, acting through the Department of Justice, under §4 of the Sherman Act, 15 U.S.C.A. §4, and §15 of the Clayton Act, 15 U.S.C.A. §25, to enjoin the proposed merger of the Third National Bank in Nashville (Third National) and the Nashville Bank & Trust Company (Trust Company). Violations of §1 of the Sherman Act, 15 U.S.C.A. §1, and §7 of the Clayton Act, 15 U.S.C.A. §18, were charged in the complaint. Acting pursuant to the Bank Merger Act of 1960, 12 U.S.C.A. §1828(c), the Comptroller of the Currency, notwithstanding adverse reports on the competitive factors involved from the Attorney General, the Federal Reserve Board, and the Federal Deposit Insurance Corporation, approved the merger on August 4, 1964 on the basis of a written opinion and detailed findings of fact. Plaintiff's motion for a preliminary injunction was heard August 14 and 15, 1964; it was denied August 18, 1964; and the merger was consummated the same day. Before trial on the merits and after extensive pretrial proceedings in this action, Congress enacted Public Law 89-356, 80 Stat. 7, as an amendment to §18(c) of the Federal Deposit Insur-

ance Act, 12 U.S.C.A. §1828(c). The Amendment, approved February 21, 1966 and referred to as the Bank Merger Act of 1966, effected material changes in the 1960 Bank Merger Act. By §2(c) the Amendment was made applicable to pending antitrust actions involving bank mergers consummated after June 16, 1963. The significance of that date was that the Supreme Court of the United States then rendered its opinion in *United States v. Philadelphia National Bank, et al.*, 374 U.S. 321, holding that the Bank Merger Act of 1960 did not, by directing the banking agencies to consider competitive factors before approving bank mergers, immunize mergers approved by them from later judicial challenge under the antitrust laws. Despite prior approval by the Comptroller of the merger of the second and third largest commercial banks in *Philadelphia*, the Court held the proposed merger to be forbidden by §7 of the Clayton Act and such merger was accordingly enjoined. So, absent the 1966 Amendment, the Court's only task in this case would be to determine whether the merger now under scrutiny runs afoul of antitrust laws without regard to any of the banking factors enumerated in the 1960 Act. It is clear, however, that the Amendment introduces new standards to be applied by the banking agencies, by the Department of Justice, and by the courts alike. It reflects the congressional attempt to reconcile the judicial application of antitrust concepts with the standards applied by federal banking agencies in evaluating merger applications under the 1960 Act. By §18(c)(5)(B) of the Federal Deposit Insurance Act, as amended by the 1966 Amendment, it is provided that the responsible agency shall not approve any proposed merger transaction which shall violate the specified antitrust standards "unless it finds that the anti-competitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The Amendment then proceeds in the immediately following paragraph: "In every case, the responsible agency shall take into consideration

the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.”¹

By §18(c)(7)(B) it is provided that the “standards” applied by the courts in antitrust actions attacking bank mergers “shall be identical with those that the banking agencies are directed to apply under paragraph (5),” and by §2(c), courts are directed to “apply the substantive rule of law set forth in §18(c)(5) of the Federal Deposit Insurance Act, as amended by this Act” in all antitrust litigation pending before them on and after the date of enactment of the 1966 Amendment with respect to all mergers consummated after June 16, 1963, the date of the Supreme Court decision in *Philadelphia*.

Thus from the terms of the Amendment as well as from its legislative history,² the basic congressional intent in enacting the 1966 Amendment appears to be clearly mirrored: Bank mergers must be examined and analyzed by

¹ Sec. 18(c)(5) of the Federal Deposit Insurance Act as amended by the 1966 Amendment provides:

The responsible agency shall not approve—

(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

² H.R.Rep. 1221, 89th Cong. 2d Sess. (1966), Bank Merger Act Amendment.

the agencies and by the courts in terms of the antitrust standards prescribed in the Amendment, such analysis to include consideration of the enumerated special banking factors, and any violations of such standards shall constitute a barrier to bank mergers unless "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." "In every case," as the Amendment explicitly provides, there shall be taken into account "the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served." The banking industry is thus recognized as occupying a unique place in our national economy requiring a specialized set of antitrust standards, and under prescribed conditions exemption from the operation of antitrust consequences altogether with the exception of those prescribed in §18(c)(5)(A).

Before advertent to the merits of this case, it becomes necessary to resolve a problem of procedure. This problem arises because the Comptroller formally approved the merger prior to the 1966 Amendment and in the light of the factors of the Bank Merger Act of 1960. While the 1960 Act required him to consider anticompetitive effects, it did not require him to accord this factor any particular weight or to determine antitrust issues per se.*

* The 1960 Bank Merger Act applied to all banks insured by the Federal Deposit Insurance Corporation and banking agencies in considering merger applications were required to evaluate:

(1) The financial history and condition of each of the banks involved; (2) the adequacy of its capital structure; (3) its future earnings prospects; (4) the general character of its management; (5) the convenience and needs of the community to be served; (6) and whether or not its corporate powers are consistent with the purposes of this chapter . . . the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly) and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. (12 U.S.C.A., § 1828 (c). (1964)).

In *United States v. Crocker-Anglo National Bank, et al.*, C.A. 41,808, United States District Court, Northern District of California, 35 L.W. 2209, a three-judge court rendered its opinion on October 6, 1966 in one of the three post Philadelphia cases pending at the date of the enactment of the 1966 Amendment in which mergers had been consummated after the *Philadelphia* decision. The other two pending cases were the present case and a case pending in St. Louis. Although mergers consummated before the *Philadelphia* decision were exempted from Sherman §1 and Clayton §7, the new antitrust standards of the 1966 Amendment were made to apply to all mergers consummated after that decision, including those challenged in the three pending cases, as we have seen. In *Crocker-Anglo*, as in this case, the Comptroller of the Currency had approved the merger prior to the 1966 Amendment by applying the different criteria of the 1960 Bank Merger Act. He had not assessed its validity under the standards of the 1966 Amendment. The California Court, pointing out that under §18(c)(7)(A) courts are directed to "review *de novo* the issues presented" in actions under the 1966 Amendment, stated:

No difficulty would be presented here so far as reviewing *de novo* the first of these determinations for this court has traditionally adjudged whether mergers have anticompetitive effects. But the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding.

Entertaining this view the Court construed the 1966 Amendment as limiting the Courts' role in pending cases as well as in all future cases to a review of the findings made by the Comptroller pursuant to the 1966 criteria. As there were no such findings by the Comptroller before

the court in *Crocker-Anglo*, it was directed that the action be remanded to the Comptroller to update his findings and conclusions under and in the light of the new standards of the 1966 Amendment. It was intimated in the opinion that the court's power to review such findings as to anti-competitive effects would be somewhat broader in scope than its power to review the Comptroller's findings that anticompetitive effects are "clearly outweighed in the public interest," or as to what constitute the "conveniences and needs of the community to be served." As to the latter, the courts would be restricted to a "determination of questions of law and ascertainment of whether findings of fact by the agency are supported by substantial evidence," taking into account not only the evidence before the Comptroller but also any additional evidence made a part of the record at the trial. The *Crocker-Anglo* interpretation of the 1966 Amendment as to the scope of the judicial function in the three cases pending at the time of its enactment is supported by a carefully reasoned opinion, although it must be conceded that the issue of statutory interpretation is not free from difficulty. In any event it is not deemed necessary in this action to follow the example of the California Court in remanding the action to the Comptroller for findings specifically formulated under the new criteria of the 1966 Amendment. In *Crocker-Anglo* the trial occurred before the effective date of the 1966 Amendment, and that court accordingly did not have before it any findings by the Comptroller assessing the merger on the basis of the newly enacted standards. Under such circumstances, it was the court's view that a remand to the Comptroller for updating his findings and conclusions was the proper and expedient course to follow. In contrast, the present action was tried after the 1966 Amendment and the Comptroller's assessment of the present merger under the new criteria and standards of the Amendment has been presented to the Court in various ways. First, having intervened as a party to the action under the provisions of the 1966 Amendment allowing

such intervention as of right, (§18(c)(7)(D) of the Federal Deposit Insurance Act, as amended), he has filed a formal answer setting forth his views that the merger is not substantially anticompetitive when evaluated under the terms of the 1966 Amendment, and that any anticompetitive effects are clearly outweighed in the public interest by the convenience and needs of the community to be served. The same views and opinions have been presented to the Court by the Comptroller, acting through his attorney, at various stages during the trial, including the making of oral arguments, the filing of written briefs, and the filing of suggested findings of fact and conclusions of law to be approved by the Court. Of greater significance, however, is the fact that the Comptroller appeared as a witness at the trial and expressed the same views and opinions in response to numerous questions on direct and cross examination. His testimony convincingly demonstrated that he was entirely familiar not only with the new standards of the 1966 Amendment, but also with the essential and material facts which had been developed at the trial. Like testimony was given by the Regional Comptroller of the Currency. There is no reason to conclude that these steps were not taken by the Comptroller in good faith. Nor are the Comptroller's opinions expressed as a witness under oath entitled to any less weight because he saw fit to intervene as a party in the action. If he concluded that the merger met the tests of the 1966 Amendment, as he obviously did, it was his right, if indeed it was not his duty, to intervene in the action to support that conclusion and to make his views, opinions and findings known to the Court.

The trial was a protracted one, extending over approximately six weeks and involving some 3,800 pages of transcript. A remand to the Comptroller could only serve the purpose of further delay. It is idle to suppose that any further significant evidence could be unearthed, or that the Comptroller would be likely to come to any different conclusion, or that he could have any better grasp of the

controlling facts than he possessed at the trial. Since the purposes of a remand have been substantially accomplished in the manner indicated, and since the Comptroller's findings and opinions are before the Court under both the 1960 Bank Merger Act and the 1966 Amendment, the Court concludes that the remand procedure is not required.

What, then, is the scope of judicial review? Applying the rationale of the *Crocker-Anglo* opinion, the Court's review of anticompetitive effects should be broader than "public interest" and "convenience and needs." The banking agency's finding on the first issue should be accorded some weight in view of its expertise and the technical and complex nature of the banking industry, but since a violation of antitrust standards is primarily a legal issue which courts have traditionally considered they should make an independent determination which respect to it. On the other hand, since the question whether anticompetitive effects are outweighed in the public interest by the convenience and needs of the community is, in the language of the *Crocker-Anglo* opinion, "plainly and unquestionably a legislative or administrative determination . . .," the Comptroller's findings should not be disturbed unless they are unsupported by substantial evidence. This view finds strong support in the statement of the Supreme Court in *Philadelphia*, at p. 371:

We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence. . . .

In seeking to void the merger under investigation the plaintiff relies upon Section 1 of the Sherman Act as construed in *United States v. First National Bank of Lexington*, 376 U.S. 665 (1964), and upon Section 7 of the Clayton Act as construed in *United States v. Philadelphia National Bank*, *supra*. As in *Lexington* and *Philadelphia*,

the plaintiff's case rests primarily upon inferences derived from statistics and upon the rules of prima facie invalidity enunciated in those cases. It is argued that the merging banks were "major competitive factors" in the relevant Davidson County market, that the merger resulted in the elimination of competition between them, and, consequently, that the case falls squarely within the ambit of the Supreme Court ruling in *Lexington* under Section 1 of the Sherman Act. A fortiori, it is argued that the merger is forbidden under the less stringent provisions of Clayton Section 7. It is further insisted, independently of the Sherman Act, that the merger must fall under Clayton Section 7 standards as delineated in *Philadelphia*, in that (a) the merger has produced a firm controlling an undue percentage share of the relevant market, and (b) it has resulted in a significant increase in the concentration of firms in that market. It is therefore said that the merger "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." In this case the plaintiff says that there is no such countervailing evidence. Plaintiff also relies upon the statement in a footnote of the *Philadelphia* opinion that "if concentration is already great, the importance of preventing even slight increases in concentration . . . is correspondingly great." Plaintiff would drastically minimize the effect of the 1966 Amendment. Its position as to the impact of the Amendment is thus succinctly stated in its trial brief.

The 1966 Amendment did not change materially the tests of antitrust legality applicable in bank merger cases. The Act was designed primarily (1) to require the bank supervisory agencies to give more weight than heretofore to the competitive factor in ruling on future merger applications, (2) to remove any impression that the standards of *Philadelphia* and those of the Bank Merger Act of 1960 differ in fact, and (3) to make it clear that, as suggested in *Philadelphia*, limited recognition was to be given to

the special features of commercial banking in terms of consideration of the "banking factors"—primarily a failing company doctrine with "somewhat larger contours," *Philadelphia National Bank*, *supra*, 374 U.S. at 372 n. 46.

Taking notice of the suggestions in the *Philadelphia* opinion that the failing company doctrine may have somewhat larger contours in the banking area, the plaintiff would construe the banking factors enumerated in the 1966 Amendment as being concerned primarily with the question of solvency and protection of the community against a failing bank. This is true, as the plaintiff insists, not only with respect to financial and managerial resources, but also with respect to the concept of convenience and needs of the community.

The plaintiff's restrictive interpretation of the 1966 Amendment finds little support either in legislative history or in the text of the Amendment itself. On the contrary, both legislative history and the textual provisions of the Amendment strongly indicate that it was the intent of Congress to effect substantial changes in existing antitrust law relative to bank mergers as enunciated in the *Lexington* and *Philadelphia* cases. *United States v. Crocker-Anglo National Bank, et al.*, *supra*. After the decision in the *Philadelphia* case, the validity of bank mergers was made to depend in the final analysis, if challenged in the courts, upon the application of traditional antitrust standards. Except for the vague intimation that the failing company doctrine might have somewhat larger contours in bank merger cases, no consideration was to be given in an action challenging Bank mergers under antitrust laws to the special banking factors contained in the 1960 Bank Merger Act. Essentially what the 1966 Amendment does is to change this ultimate test of validity from one depending strictly upon antitrust laws to a test balancing antitrust considerations with the special factors recognized by Congress as peculiarly applicable to the banking industry. The House Report on the 1966 Bank Merger

Amendment clearly sustains this view. Under the heading, "What the Bill Would Do," it is stated that it would establish a single set of standards for the consideration of future mergers by the responsible banking supervisory agencies, the Department of Justice, and the courts under the antitrust laws—standards stricter than those in the Bank Merger Act "but which include both the effect on competition and the convenience and needs of the community to be served," a standard clearly different from that of the *Lexington* and *Philadelphia* cases.

It is pointed out under the heading, "The Need for the Legislation," that the committee had heard the contention made that banking is such a unique industry and that the determination of where the public interest lies in a given bank merger situation requires such special expertise that any bank merger which has been approved by the appropriate federal supervisory agency should be absolutely immune from antitrust attack. On the other hand, the committee had heard the contention advanced with equal vigor that any bank merger whose effect would be to lessen competition should on that ground alone be absolutely prohibited, and that neither agencies nor courts should be permitted to examine the question of whether the overall effect of such merger might be in the public interest.

Under the heading "Purpose of the Bill," the floundering bank problem is discussed as follows:

Under general antitrust law criteria, particularly as they have been developed over the past few years, the banking agencies find it difficult to deal as they would like with the floundering bank problem in medium to smaller sized communities. The problem arises where there is a relatively small number of banks, and one or more of these banks appear to be stagnating. It may be because it is below the economic minimum size to attract capable and vigorous management personnel, it may be because it is closely held by owners who insist on unrealistically conservative policies, or it may be for any other reasons which are discernible only by an examination of that particular bank as an individual institution. The banking

agencies, with some differences in degree among themselves, have contended that they should be able to consider a merger application on the basis of such an individual examination, and to approve it if they believe that the result would be a more vigorously competing institution, furnishing better overall service to the community, even though the reduction in the number of competing units, or the concentration in the share of the market in one or more lines of commerce, might result under general antitrust law criteria in a substantial lessening of competition.

As to the intended legal effect of the Bill, the House Report proceeds:

First, it is intended to make clear that no merger which would violate the antimonopoly section (sec. 2) of the Sherman Anti-Trust Act may be approved under any circumstances.

Second, the bill acknowledges that the general principle of the antitrust laws—that substantially anti-competitive mergers are prohibited—applies to banks, but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served—recognizing that effects outside the section of the country involved may be relevant to the capacity of the institution to meet the convenience and needs of the community to be served—that it would be in the public interest to permit it.

Third, the bill provides that this rule of law is to be applied uniformly, in judicial proceedings as well as by the administrative agencies.

Turning to the text of the 1966 Amendment, it becomes even clearer that bank mergers are sui generis, to be assessed as to anticompetitive effects not alone on the basis of the quantitative analyses of the *Lexington* and *Philadelphia* cases, but, in addition, by taking into account all material factors with respect to each institution in the setting of the relevant market, and by evaluating the special banking factors delineated in §18(c)(5)(B). By

that section, as we have seen, not only may anticompetitive effects be outweighed by the convenience and needs of the community to be served, but responsible agencies and courts alike are mandated to take into consideration "in every case" the following special factors:

- (1) Financial resources of the existing and proposed institution;
- (2) Their managerial resources;
- (3) Their future prospects; and
- (4) The convenience and needs of the community to be served.

There is nothing in the language of this section to indicate that the special banking factors were to be given limited recognition only, or that they were to be concerned primarily with the question of solvency. It is clear that the factors embrace the problem of the failing bank as well as that of the "floundering" or "stagnating" bank. Certainly possible insolvency is an important consideration, but it may be of equal importance to the economy to eliminate a bank which has reached a point of deterioration or stagnation and to permit its merger with a "more vigorously competing" institution. Are the cases of floundering banks the "somewhat larger contours of the failing company doctrine" to which plaintiff refers? The answer from legislative history justifies an affirmative answer.

Nor does the language of Section 18(c)(5)(B) support the thesis that agencies and courts in considering anticompetitive effects in bank merger cases are to be hamstrung by cold statistics and are not to be allowed to look to the total facts in context to determine whether the statistics reflect the true competitive situation.

Mr. Justice Harlan, dissenting in the *Lexington* case, expressed the view that Congress in the Bank Merger Act of 1960 had plainly indicated that it did not intend that

mergers in the banking field should be measured solely by the antitrust considerations which are applied in other industries. He further stated that adherence to the principles enunciated in *United States v. Columbia Steel Co.*, 334 U.S. 495,⁴ "would leave room for an accommodation within the framework of the antitrust laws of the special features of banking recognized by Congress." Because of the ruling in *Philadelphia*, this accommodation was not effectively accomplished by the 1960 Bank Merger Act, but the Court is persuaded that the accommodation to which Mr. Justice Harlan referred is the fundamental purpose and effect of the 1966 Amendment in providing that anti-competitive effects may be outweighed in the public interest by the convenience and needs of the community, and that consideration shall be given in every case to the qualitative banking factors specifically enumerated. These factors are sufficiently comprehensive in character not only to embrace the *Columbia Steel* criteria, but also to require an even broader scope of inquiry and analysis with respect to antitrust issues.

The Court's construction of the 1966 Amendment is supported by the Amendment's provision that bank mergers shall be considered in the first instance by the responsible banking agency, applying the standards of Section 18(c)(5), by the requirement that courts shall apply identical stand-

⁴ These principles were stated in the *Columbia Steel* opinion as follows:

In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed. At page 527.

ards, and by the provision that the Courts' role shall be limited to reviewing *de novo* the issues presented under the 1966 Amendment. If it was the purpose of the Amendment simply to perpetuate without modification the *Lexington* and *Philadelphia* antitrust criteria in the banking field, it is not apparent why Congress would have emphasized by these provisions the importance of the responsible agencies' expertise with respect to bank mergers. The structuring of the Act in this respect cannot be reconciled with the logic of the *Philadelphia* decision that courts must determine the validity of bank mergers on the basis of antitrust considerations alone—primarily derived from statistics—independently of and without regard to the special features of banking recognized by Congress. Whereas under the *Philadelphia* rationale, courts determined anticompetitive effects without regard to banking factors and banking agencies determined both, a balanced consideration of anticompetitive effects and banking factors is now enjoined upon both agencies and courts, the agencies speaking first and the courts reviewing "*de novo*" the issues presented.

Entertaining these views as to the thrust of the 1966 Amendment, the Court is of the opinion that while the plaintiff has established an arguable case for condemnation of the merger under the pre-1966 standards of the *Lexington*, *Philadelphia* and other cases, treating Davidson County as the relevant geographic market and commercial banking as the services or products market,⁵ the merger

⁵ The Court rejects the defendants' and intervenor's argument that in assessing the anticompetitive effects of the merger the relevant geographic market is the broad area served by Third National's correspondent banking system. There is no significant legislative history to support the view that the 1966 Amendment was intended to change the relevant geographic market concept as developed in antitrust law. The Court is of the opinion under the facts of this case that the relevant geographic market is Davidson County. This is "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States v. Philadelphia National Bank*, *supra*,

is not violative of the new antitrust standards of the 1966 Amendment.

The term "arguable case" is used for the reason that there are at least some conspicuous points of difference between the case at bar and *Lexington* and *Philadelphia*, whether or not such differences are of controlling significance. In the *Lexington* case, the Supreme Court held invalid under Section 1 of the Sherman Act the consolidation of the first and fourth largest commercial banks in Fayette County, Kentucky. Before the consolidation the largest bank, First National, had approximately 40% of the assets, deposits and loans in the relevant market which was determined to be Fayette County. The fourth largest bank, Security Trust, before the consolidation had approximately 12% of the assets, deposits and loans. After the consolidation, the new bank, First Security, had approximately 52% of the assets, deposits and loans. The bank established by the consolidation was larger than all of the remaining banks combined. In addition to these statistics reflecting "bigness," the Court relied upon the testimony from three of the four remaining banks that the consolidation would "seriously affect their ability to compete effectively over the years." It was concluded that the two banks before the consolidation were major competitors and that the elimination of significant competition between them constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

at p. 357. Also, on the clear preponderance of the evidence in this case the appropriate "line of commerce" by which to appraise the competitive effects of the merger is the cluster of products and services denoted by the term commercial banking. The Court does not agree that the omission of the words "in any line of commerce" from the 1966 Amendment is indicative of a congressional intent to reject "commercial banking" as a distinct line of commerce in appraising anticompetitive effects. It cannot be presumed that such an important change in established antitrust law would be made by mere omission. Again, there is really no significant legislative history to support the defendants' and intervenor's position on this point.

The statistics of the present case, of course, are not as impressive as those in *Lexington*. Third National, having approximately 33% of assets, deposits and loans before the merger, possessed approximately 38% in these categories after the merger. It was second in size before the merger and it retained the same position in the Davidson County market after the merger. The Trust Company's share of assets, deposits and loans before the merger was only approximately 5% as compared with the 12% of the smaller bank in *Lexington*. There is no comparable testimony in the present case from any of the remaining banks in Davidson County that the consolidation will seriously affect their ability to compete effectively. In *Philadelphia* a 30% market share resulting from the merger was regarded as undue, as compared with approximately a 38% market share in the present case; but in *Philadelphia* the merger resulted in a 33% increase in concentration between the two largest banks; whereas the increase in the present case between the three largest banks is approximately 5%.

The *Philadelphia* merger formed a bank which became the largest in the market area; whereas, in this case, as pointed out, the new banking institution will continue to occupy second place. In *Philadelphia* neither of the banks involved had antitrust clean hands—the Philadelphia National having acquired nine formerly independent banks and Girard having acquired six, such acquisitions having extended over a long period of time into the recent past. In the case at bar, there is no significant merger history either with respect to the two banks or in the Davidson County commercial banking market.

Other differences could be pointed out, but it is clear to the Court that whatever the result in this case may have been before, the merger now under consideration does not run afoul of antitrust standards when evaluated in the terms of the 1966 Amendment, as the Court construes it.

The Trust Company was chartered in 1889. Its name was changed in 1956 to Nashville Bank & Trust Company. It opened its only branch in 1959. Prior to the change of

ownership in 1964, the controlling interest in the Trust Company had been owned by H. G. Hill, Jr. and his retail grocery chain operating in the Middle Tennessee area. The institution had been operated primarily as a trust company* with commercial banking occupying a place of secondary importance. In 1956 it brought in a former railroad executive, W. S. Hackworth, as president and began to emphasize the commercial aspects of its operation. During the period from 1955 to 1964 its assets, deposits and loans more than doubled, and its earnings record was good. This rate of growth, however, leveled off about the year 1960. From that time until the merger with Third National its rate of growth was markedly less than that of any of the other banks in Davidson County. For the period 1956-60 its rate of growth in total assets was 46.55%, a figure which dropped to 20.32% for the period 1960-64. For the same periods the drop in deposits was from 50.58% to 18.77%, and the drop in total loans in discounts was from a percentage gain of 77.57% to 29.86%. Its percentage of total banking business in the market declined from 5.72% on June 30, 1960 to 4.83% on June 30, 1964.

The evidence demonstrates conclusively that the Trust Company, when considered as a commercial bank, has not been an innovator or an aggressive competitor. Its operations have been dominated by unaggressive and ultra-conservative management policies. At the time of the merger and for many years prior thereto it had a serious lack of managerial resources due primarily to the fact that

* The Trust Company had created and maintained what was for the most part a good trust department, an aspect of its operations which need not be discussed in detail herein. Trust departments, as the evidence shows, are operated primarily as a service to bank customers and are not an important lever in obtaining commercial business. While there is some direct competition for trust business in the market area between commercial banks having trust departments, such competition is minimal. The greatest area of direct competition for trust business is not with other banks but with individuals, such as lawyers. The loss of a trust account to a competitor bank is of infrequent occurrence.

its salary scale was wholly inadequate and it was without a funded pension plan for its employees. As pointed out by the Comptroller of the Currency in his decision approving the merger on August 4, 1964, "a bank is only as good as its management." At that time the 68 year old bank president was seriously ill and anxious to retire, having an illness which has since caused his death. H. G. Hill, Jr., Chairman of the Board, had sold the controlling stock interest in the Trust Company, owned by his grocery firm, the H. G. Hill Company, to William C. Weaver and associates, and resigned from the bank's board of directors. Kirby Primm, the bank's only full time business solicitor, had resigned and taken a position with the First American National Bank, the largest bank in the market area. All three of these men had been key factors in the growth which the bank had enjoyed during Hackworth's tenure as president, and it is no exaggeration to say that so far as the Trust Company's commercial business was concerned they were practically irreplaceable. Much of the new business was brought to the Trust Company due to the formidable influence and personal business connections of Hill and Hackworth. Primm had been exceedingly resourceful in soliciting new business, particularly in capitalizing upon firms which did business with the Hill grocery stores. The decline in the bank's rate of growth is attributable in large measure to the loss of two of these individuals, to Hackworth's declining health, and to the lack of branch banks and other necessary facilities. In addition, both Hackworth and Primm testified that the Trust Company had reached a plateau and that they had gone as far as they could in bringing in new business by soliciting their friends and business connections. Hackworth described the bank's dilemma as follows:

The earnings of Nashville Bank and Trust Company in the immediate past have been satisfactory. However, if the Nashville Bank and Trust Company made the expenditures necessary to bring it into a position to compete successfully and substantially in

the Nashville area banking industry, such as additional branch banks, increased salary scale, automation, funded pension plan, employee welfare benefits and other related modern banking methods and procedures which have come to be necessary in order to render adequate and modern service to the public, it is certain that its pattern of satisfactory earnings could not be maintained and such earnings might very well disappear.

The evidence demonstrates that the Trust Company management problem was one of serious proportions which made it practically impossible to attract and hold competent young men. It is significant that during his 17-year tenure at the Trust Company Primm's salary had increased by only 45% above a very low beginning, and that First American offered him an immediate salary increase of 60%.

The Trust Company's lack of dynamism and aggressiveness is demonstrated in many other ways. There had been no change in department heads from 1946 until the merger in 1964, a situation hardly calculated to interest young managerial leadership. Many of its officers and board members were old and the bank was in serious need of qualified young men as replacements. Although the Trust Company, due primarily to the personal business relationships of Hackworth and Hill, was able to grow substantially during the early years of Hackworth's tenure, no substantial or concerted effort was made to improve or modernize its methods, facilities, attitudes or personnel and management policies. For example, it consistently had the lowest loan to asset ratio of any bank in Davidson County, its loans being confined primarily to real estate and secured loans as distinguished from short term commercial loans. It operated without the benefit of credit files or a credit department. It employed no credit specialists. In consequence it was not able to handle indirect consumer loans or the larger, more complicated credit situations. Its loss experience, particularly in recent years, had not been good. Its emphasis was consistently upon profits rather than

upon making the expenditures necessary to place itself in a posture to be truly and significantly competitive. In addition to inadequate salaries, the lack of a funded pension plan and low fringe benefits, it failed to provide branches, the hallmark of modern banking. It had only one branch as of the date of the merger in the Davidson County market in which there were 52 branch banking offices. Nor did it provide modern equipment, modernized banking quarters, or a continuous audit program. It was not a member of the Federal Reserve system and it had no regular customer call program.

Capital City Bank, on the other hand, which had only begun operations in 1960, and being less than one-fourth the size of the Trust Company, had established three branches. The Comptroller of the Currency was of the opinion that the Trust Company could have established from eight to ten branches in Davidson County if it had so desired. He stated that its failure to branch indicated that it was not disposed to make the needed struggle indicated for growth. Its failure to have any automated or computerized equipment stands in contrast with most other banks of its approximate size in Tennessee. There were many other indicia of negative and unprogressive management policies, including its failure to remedy serious problems in the credit department despite warnings by the FDIC Examiner, its high proportion of criticized loans as reflected in FDIC reports, and its failure to hold any officer staff meetings since 1962.

Considering the Trust Company's problems, deficiencies and weaknesses, it is not difficult to understand the Weaver group's decision to merge with Third National rather than to undertake the formidable task of negotiating another sale, or the even more formidable task of solving the bank's many problems directly. The Weaver group had purchased the controlling stock in the Trust Company in the early part of 1964 as an investment. The members of the group had had no previous banking experience and none of them had planned to become members of the Board

of Directors, or to devote their full energies and resources to rebuilding the bank. Fully realizing the extent of the bank's operational problems and difficulties only after the purchase, and realizing that the bank could not be revitalized as a competitive factor in the market without the expenditure of large sums of money, it was their conclusion that the best solution was to take the merger route.

In view of this attitude on the part of the new management, the Comptroller of the Currency correctly concluded in his decision approving the merger that "when a bank, such as the merging bank, is not disposed to compete, it is idle to speak of the elimination of competition by reason of the merger." Despite its growth record in Hackworth's early years as President, the future prospects of the bank at the time of the merger may be described as unpromising. While there is some conflict, the preponderance of the evidence is that it would have been practically impossible within any reasonable period of time to obtain adequate managerial replacement either from within the bank or from the outside, a product of the bank's failure to have adequate personnel and management policies, of its overly conservative attitudes, and of its failure to make the necessary expenditures to provide itself with the facilities, procedures and equipment required to maintain a competitive posture.

Only a brief word need be said concerning Third National and its position in the relevant market. There is no dispute in the record that it had been a strong, dynamic and aggressive bank since its organization in 1927. It was characterized by the Comptroller of the Currency in his testimony at the trial as one of the strongest and best managed banks in the nation. Of particular significance is the fact that its steady and impressive growth between 1927 and 1964 had been entirely the result of internal expansion, having no prior history of acquisition of assets by merger or consolidation. It had, in addition to its main office, some 14 branch offices in Davidson County. It has been active in the correspondent banking field, having approxi-

mately 365 correspondent bank accounts prior to the merger, most of which are located within a radius of 250 miles. Prior to the merger in 1964, it had total deposits of \$315,090,000.00 as contrasted with the largest bank, First American National, with deposits of \$371,108,000.00, and Commerce Union, the third largest bank, with deposits of \$202,624,000.00. At that time the Trust Company had total deposits of \$45,471,000.00, occupying fourth place in the market. The fifth largest bank, which had entered the market only four years previously, Capital City, had deposits of \$7,266,000.00. The other three banks in the market were the Bank of Goodlettsville with deposits of \$6,369,000.00; Citizens Savings with deposits of \$3,053,000.00; and Whites Creek Bank with deposits of \$2,603,000.00. After the merger all the Davidson County banks continued a substantial growth. As of June 1965, Third National had total deposits of \$375,063,000.00; First American National had \$393,040,000.00; Commerce Union had \$219,514,000.00; and Capital City had \$8,954,000.00. The remaining three banks had increased their combined deposits of \$12,025,000.00 before the merger to \$13,590,000.00.

When the general characteristics of the Davidson County market are considered, the plaintiff's insistence that the market is unduly concentrated appears to be lacking in significance. At the time of the merger all of the eight Davidson County banks had combined assets of slightly less than one billion dollars. In such a relatively small banking market it does not appear unreasonable that there should be a concentration of approximately 93% of combined assets in three banking institutions, this figure being approximately 97% after the merger of the Trust Company and Third National. The record contains figures for comparable southeastern markets competitive with Nashville and having three major banks holding between 90 and 100% of the loan and deposit business. For example, Chattanooga has concentration among three banks of 100%; Mobile, Alabama, 98%; Birmingham, Alabama,

93%; Jackson, Mississippi, 98%; Memphis, 91 to 92%. The three largest cities in Tennessee—Memphis, Nashville and Knoxville—are now served by only seven banks, the largest number for any Tennessee city.

A meaningful fact in this case is that the Davidson County banks have attained their present market shares and size through internal growth and not through acquisition, a fact which is in marked contrast with the situation which prevailed in the *Philadelphia* case, as already pointed out. Another distinctive characteristic of the Davidson County market is that it is highly competitive at all levels, a fact which is clearly established by the preponderant testimony of competent and knowledgeable expert witnesses and by objective evidence of low service charges. Rivalry for business has always been exceptionally keen. The ease of entry is clearly indicated by the case of Capital City Bank which entered the market in 1960 and has had a substantial and continued success. There is no evidence of oligopolistic behavior in the relevant market. On the contrary, that the Nashville banks are keenly competitive with respect to service charges, the solicitation of business, and in making changes and innovations is the only fair and reasonable conclusion which can be drawn from the record.

If the *Columbia Steel* factors, relegated to a place of relative unimportance in the *Lexington* case, are considered to have been restored to grace with respect to bank mergers by reason of the 1966 Amendment, and the Court is convinced that they were, and if the present case is accordingly analyzed in terms of such factors, it seems clear that the plaintiff's position in this case cannot be sustained. On the present record, only the *Columbia Steel* factors dealing with size can arguably be said to favor the plaintiff's position. It may be conceded for present purposes that the *dollar volume* and *percentage of business controlled* are significant. But the *strength of the remaining competition* is clearly established in this case by the assets,

deposits and loans of the seven banks in the Davidson County market remaining after the merger, and by competent testimony of bank experts familiar with the market, that the remaining banks were active, vigorous and highly competitive. There is also convincing testimony that the merger has actually resulted in an intensification of competition among the Davidson County banks. Of importance in this connection, as already stated, is the fact that all banks since the merger have had substantial growth. The *motive* for the present merger was not predatory, but was based upon an evaluation of business and economic factors. A merger with Third National was determined to be the best solution to the grave problems confronting the Trust Company at the time of the merger. Without the merger these problems could not have been solved without drastic expenditures over a protracted period of time. Finally, the preponderance of the evidence in this case with reference to the *probable development of the industry, consumer demands and other market characteristics*, is highly favorable to the merger. The Davidson County market has had no merger history; there is no trend toward concentration; the service area is rapidly growing with consumer demands being on the increase and the market being recognized as one of the most highly competitive in the nation; the remaining banks are well managed under vigorous and dynamic leadership; the Trust Company had reached a stagnant and deteriorating posture at the time of the merger, having critical managerial and other problems and deficiencies; the new owners were investors who were not disposed to make the sacrifices necessary to overhaul the bank so as to place it in a position to be substantially competitive with other banks; and actual or probable future of oligopolistic behavior is contradicted by the record. This analysis, notwithstanding the concentration and market share figures upon which plaintiff relies, compels the conclusion that the present merger is not a transaction "in restraint of trade" and consequently not prohibited by Section 18(c)(5)(B) of the Federal Deposit

Insurance Act, as amended by the 1966 Amendment, the analogue of Section 1 of the Sherman Act.

Similar considerations lead to the conclusion that the effect of the present merger will not be "substantially to lessen competition or to tend to create a monopoly" in violation of Section 18(c)(5)(B) of the Federal Deposit Insurance Act, as amended by the 1966 Amendment, the analogue of Section 7 of the Clayton Act.

As already stated, no reliable extrapolation as to future prospects may safely be predicated upon concentration or market share figures alone. But considering the totality of facts as to the institutions involved and as to the relevant market, a conclusion that the merger may substantially lessen competition in the future is wholly unwarranted. Any other view would require the Court to close its eyes to facts which are far more convincing than any possible contrary conclusions which could be drawn from the market share or concentration statistics in this case.

The Court concludes that the Comptroller of the Currency's findings, made both before and after the passage of the 1966 Bank Merger Act, that the anticompetitive effects of the merger are minimal and that the merger is not violative of antitrust standards, is supported by the clear preponderance of the evidence in the record. As the Court is also of this view independently of the Comptroller's findings, and concludes that the merger does not violate the antitrust standards of the 1966 Amendment, it is unnecessary to inquire whether any anticompetitive effects are outweighed by the convenience and needs of the community. However, the Court is of the opinion that the preponderance of the evidence supports the Comptroller's finding that the convenience and needs of the community and the public interest will be far better served by Third National Bank with the additional assets which it acquired as a result of the merger than would be the case by maintaining the Trust Company as a separate institution. The Trust Company had simply reached a

period of imminent deterioration. It was at the time of the merger a "floundering" bank, though not a failing one. It was no longer capable under its existing ownership and management, and with its existing facilities, procedures, and attitudes to serve the public on a competitive basis with other banks in the market area. It was more attuned to the Victorian age which gave it birth than to the competitive realities of 20th Century commercial banking.

The Court will presently enter and file with the Clerk detailed findings of fact and conclusions of law to implement and supplement this opinion. Pending such filing, entry of final judgment denying the relief sought by the complaint will be withheld.

/s/ WILLIAM E. MILLER
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI,

EASTERN DIVISION

No. 65C 241 (1)

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION
AND SECURITY TRUST COMPANY, *Defendants.*

and

COMPTROLLER OF THE CURRENCY,
JAMES J. SAXON, *Intervening Defendant.*

Memorandum and Order

This matter is before the court on motion to dismiss filed by the defendant, Mercantile Trust Company National Association, and the defendant, Security Trust Company (hereinafter referred to as Banks), and motion to dismiss filed by the intervening defendant, Comptroller of the Currency (hereinafter referred to as Comptroller). The basis for both motions is failure to state a cause of action, and they were submitted to the court after oral arguments and the filing of briefs.

The Justice Department began this action to enjoin a proposed merger of the defendant Banks. The proposed merger had been approved by the Comptroller.

The complaint alleged that the proposed merger would violate Section 1 of the Sherman Act (15 USCA 1) and Section 7 of the Clayton Act (15 USCA 18), and at the same time a motion for a preliminary injunction was filed.

The Comptroller intervened and filed an answer and the defendant Banks answered. All defendants opposed the granting of the preliminary injunction. After a hearing this court denied a preliminary injunction, and the Banks thereafter completed the proposed merger.

On February 21, 1966, while the parties were pursuing discovery, the Bank Merger Act Amendment of 1966 (Public Law 89-356, hereinafter referred to as BMA-66) became law.

On September 13, 1966, the Comptroller reapproved the merger and, in so doing, stated that his reconsideration was for the purpose of complying with the standards of BMA-66.

The plaintiff has not amended its complaint since it was filed. The issue before the court is whether the complaint states a claim for relief against the defendant Banks in view of the passage of BMA-66. The pertinent parts of BMA-66 for the purpose of these motions are as follows:

"(A) section 18(c) of the Federal Deposit Insurance Act (12 USC 1828(c) is amended to read:

• • • • •
 "(c) (5) The responsible agency shall not approve—

"(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

"(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

"In every case, the responsible agency shall take into consideration the financial and managerial resources and the future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

• • • • •
 (7) (A) Any action brought under the antitrust laws arising out of a merger transaction shall be com-

menced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

"(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 USCA 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)."

Section 2(c) of the Bank Merger Act Amendment provides:

"(c) Any court having pending before it on or after the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in section 18(c)(5) of the Federal Deposit Insurance Act, as amended by this Act."

The defendant Banks and the Comptroller admit the plaintiff's complaint when filed stated a cause of action, but contend that since the passage of BMA-66 the plaintiff must amend its complaint to conform to the standards of BMA-66.

The plaintiff takes the position that the Sherman and Clayton Acts are still the only statutes applicable to this suit and that BMA-66 only has an effect upon the Comptroller. The stated purpose of BMA-66 reads:

"An act to establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks, and for other purposes."

The stated purpose of BMA-66, the text of the act itself, and the legislative history of the act (see U. S. Code and Congressional & Administrative News, pamphlet No. 2, beginning at page 334), all clearly show that the standards set forth in Section 18(c)(5) of the Federal Deposit Insurance Act (12/USCA 1828(c)(5)), as amended by BMA-66, are the standards to be applied by the courts.

Since this court can take judicial notice of a Federal statute, we will not dismiss the complaint merely because it cites the wrong statute.

Under modern notice pleading all that the complaint is required to do is to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Conley v. Gibson*, 355 U. S. 41, 47. A complaint should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff can prove no sets of facts in support of his claim which would entitle him to relief. *Id.*, page 45, and see also *Moore's Federal Practice*, Vol 2, §12.08, p. 2245. In other words, a motion to dismiss will not be granted if the complaint states a claim for which relief can be granted under any legal theory. In determining the sufficiency of a complaint, material facts, but not unsupported conclusions of the pleader, are considered in the light most favorable to the plaintiff.

If everything in the plaintiff's complaint is taken as true and looked upon in the light most favorable to the plaintiff, can it be said that the plaintiff has sufficiently alleged a violation of BMA-66, thereby giving the defendants fair notice of what the plaintiff's claim is and the grounds upon which it rests? To answer this question we must determine what the nature of an action under BMA-66 is, that is, what grounds constitute a violation thereof.

The language of BMA-66 is clear and unambiguous. In plain language, paragraph 18(c)(5)(B) states, in part, that a proposed merger shall not be approved whose effect is in restraint of trade unless it finds that the anti-competitive effects are outweighed in the public interest by the probable effects of the transaction in meeting the

convenience and needs of the community to be served. Section 2(c) specifically requires this court to apply the standards of 18(c)(5) as amended by BMA-66.

This court will not dismiss a complaint merely because it states the wrong legal theory when the allegations are sustainable under another legal theory, nor will this court require the plaintiff to plead in detail the facts constituting its grounds for relief. However, the most liberal interpretation of the rules of pleading require as an absolute minimum that the plaintiff at least state his grounds for relief and have not gone so far as to permit a pleading to stand which does not even allege a violation of any applicable law or duty.

The complaint does not allege a monopoly, but alleges that the merger may substantially lessen competition and tend to create a monopoly in violation of Section 7 of the Clayton Act. Thus, the complaint only states part of a claim against the defendants required under BMA-66, in that it does not allege a monopoly, nor that the anti-competitive effects of the merger are not outweighed in the public interest by the probable effects of the transaction in meeting the convenience and needs of the community. The plaintiff's complaint does not meet the absolute basic minimum standards of notice pleading in that it has not alleged a violation of BMA-66, the act that applies to all bank mergers, nor has it alleged sufficient facts to support such violation.

The separate motion of defendant Banks and the separate motion of intervening defendant to dismiss are each sustained. Plaintiff is granted twenty (20) days within which to file an amended complaint, and failing to file said amended complaint this cause will be dismissed.

/s/ ROY W. HARPER

United States District Judge

APPENDIX H

I

Opinion and Order of December 29, 1966

[CAPTION OMITTED]

CLARY, Chief Judge:

This is an action by the United States Government, filed by the Department of Justice (hereinafter referred to as Justice), to enjoin a merger of the Provident National Bank and Central-Penn National Bank of Philadelphia. The complaint was filed on April 1, 1966, the banks answered on April 5, 1966, and the following day the Comptroller of the Currency intervened as a party. Motions to dismiss were filed by the defendants and intervenor, and on October 13, 1966, an Opinion was filed (Docket Paper #34), together with an Order denying the motions. The basis of the Opinion was that, although this action was solely within the ambit of the Bank Merger Act of 1966 (hereinafter referred to as BMA-66), under principles of notice pleading, it was not necessary to specifically plead the BMA-66. Thus, the complaint of Justice filed under Section 7 of the Clayton Act was held valid.

However, in *United States v. Mercantile Trust Company National Association, et al.*, Civil Action No. 65C-241 (1), (Eastern District of Missouri, Eastern Division, December 19, 1966), Chief Judge Roy Harper held, on pleadings which are completely similar to the instant case, the following:

The complaint does not allege a monopoly, but alleges that the merger may substantially lessen competition and tend to create a monopoly in violation of Section 7 of the Clayton Act. Thus, the complaint only states part of a claim against the defendants required under BMA-66, in that it does not allege a monopoly, nor that the anticompetitive effects of the merger are not outweighed in the public interest by the probable effects of the transaction in meeting the convenience

and needs of the community. The plaintiff's complaint does not meet the absolute basic minimum standards of notice pleading, in that it has not alleged a violation of BMA-66, the act that applies to all bank mergers, nor has it alleged sufficient facts to support such violation.

Judge Harper dismissed the case with privilege to amend within twenty days. In the instant case, with the pleadings complete, the Government has taken an adamant position as hereinafter discussed.

After the Opinion of October 13, 1966, denying the motions to dismiss was filed, further pre-trial proceedings were had, and the Court ordered each side to submit an Identification of Witnesses, Summary of Evidence, and Statement of Position. This the Department of Justice did on November 30, 1966 (Docket Paper #44). In this document Justice stated unequivocally that it intended to prove a violation of Section 7 of the Clayton Act only, without any reference to BMA-66, contending that this was an action under Section 7, and that it was entitled to a determination of the issues on that sole basis. The ruling of this Court was exactly to the contrary.

The defendant banks, upon being served with plaintiff's Identification of Witnesses, Summary of Evidence, and Statement of Position on December 2, 1966, filed a Motion for Final Judgment (Docket Paper #45) with exhibits in support thereof. The Comptroller intervenor filed a Motion for Final Judgment (Docket Paper #46) on December 6, 1966. Thereafter, on December 12, 1966, a conference was held in chambers at which the subject was discussed in depth, a transcript of which hearing is part of the record of this case, and the Court took the matter under consideration. It is these two Motions for Final Judgment which are presently before the Court for disposition.

To date no one has denied the fact that Provident, in the four-county market area designated by the Opinion of the Supreme Court in *United States v. Philadelphia National*

Bank, 374 U.S. 371 (1963),¹ controls a definite percentage of the total assets, of the total loans, of the total IPC deposits, and of the total banking offices. Likewise, no one has denied that Central-Penn controls a definite percentage of the total assets, of the total loans, of total IPC deposits, and of the total banking offices doing business in the four-county area. In other words, no one has denied that there will be a concentration of the total of these two percentages of the total assets, of the total loans, of total IPC deposits, and of the total banking offices in the four-county area in the new bank if merged as permitted by the Comptroller of the Currency. Justice says in its Statement of Position that it will prove this and no more. Paying lip service to the ruling of this Court of October 13, 1966, it contends that BMA-66 may have some relevancy, but that this Court is without power to consider in any way the finding of the Comptroller that this merger meets the specifications and qualifications of BMA-66.

This Court has thus been asked by the Government to rule that the banks and Comptroller must present evidence with respect to the merger *de novo* as if it were being done for the first time; come to its own conclusions independently of the Comptroller and "free of presumptions traceable to anyone"² in determining the validity of this merger. The expertise, know-how, direct findings, and conclusions of the Comptroller, the Government contends, are of absolutely no probative value in this Court. In other words, the Government contends that this Court must make an independent decision as to whether the public interest in the merger outweighs any anticompetitive effects. This contention, if considered again, would raise the constitutional question of separation of powers.

¹ Despite the finding of the District Court that the two banks involved in that case were realistically in competition with banks of other states, the Supreme Court limited its consideration to the case to a four-county area.

² Plaintiff's Pre-trial Brief (Docket Paper #16), page 28.

If the function performed by an agency is "administrative" or "legislative" and if a federal court is required to do all over again what the agency has done, the system of review violates Article III of the Constitution. (Davis Administrative Law Treatise, 1958, Vol. 4, p. 180, §29.10.)

See also the Opinion of Judge Pope in *United States v. Crocker Anglo National Bank, et al.*, Civil Action No. 41,808, (District of California, Southern Division, October 6, 1966).

The Court, therefore, finds that since Justice has definitely refused to try its case under BMA-66, the banks should not be subjected to the expense and inconvenience of a trial when Justice refuses to prove other than admitted facts to establish its case. Its position has been taken deliberately and directly in opposition to the ruling of the Court of October 13, 1966, and is consistent with the position of the Government on a nationwide basis, even though the Courts have been unanimous in refusing to accept its contention. *United States v. Mercantile Trust Company National Association, et al.*, No. 65C 241 (1), (District of Missouri, Eastern Division, December 19, 1966); *United States v. First City National Bank of Houston, et al.*, Civil Action No. 66-H-695, (Southern District of Texas, Houston Division, December 2, 1966); *United States v. First National Bank of Hawaii, et al.*, Civil Action No. 2540, (District of Hawaii, October 31, 1966); *United States v. Crocker Anglo National Bank, et al.*, Civil Action No. 41,808, *supra*.

At the hearing on December 12, 1966, Justice also took the position that if the Court should grant the motion of the defendant banks and the intervenor, the Court should, in the exercise of its discretion, continue the statutory stay automatically entered when this suit was filed, taking the position that it was the sole purpose of Congress to halt all mergers after suit was filed until there has been a final determination on the merits. In this instance, it is the Department of Justice alone which has refused to proceed

with trial on the merits of the case under BMA-66. I can read nowhere in the legislative history that it was the intention of the Congress of the United States to hold up mergers indefinitely pending determination of a Department of Justice theory. It appears throughout the legislative history that the Congress was concerned with the problems of divestiture as well as the tremendous expense to the applicant banks when mergers were unduly delayed, and that stay should be granted only when the Government, through the Department of Justice, in good faith proceeded promptly to a trial on the merits. This Justice refuses to do by its intransigent position of the applicability of Section 7 of the Clayton Act only. It is, therefore, the decision of this Court that it will not stay the merger, except for a relatively short time to permit Justice to take such further action as it sees fit. A time lag, even of the statutory time for appeal, at the present time, might destroy the efficacy of the merger because of mounting expense.

The Court, therefore, enters the following

ORDER

AND NOW, to wit, this 29th day of December, 1966, upon consideration of defendant banks' Motion for Final Judgment (Docket Paper #45), Motion of Intervenor for Final Judgment (Docket Paper #46), the entire record of the case, including briefs, hearings, and arguments, it is ORDERED, ADJUDGED AND DECREED:

1. That the complaint in this case be and it is hereby DISMISSED with prejudice;
2. That the statutory stay of the merger is LIFTED and the banks may merge at a time to be determined by them, but not earlier than January 18, 1967.

By the Court:

THOMAS J. CLARY,
Chief Judge.

II

Oral Decision, November 4

Before Hon. THOMAS J. CLARY, Chief Judge.

The first question to be resolved is how much weight is to be given to the findings of the Comptroller. In the recent case of *U.S. v. Crocker Anglo National Bank* the Court, in answer to this question, declared its intention to apply the substantial evidence test to the Comptroller's public interest findings, calling the "convenience and needs" test of BMA-66, Section 5(B) non-judicial in character. Yet, *Crocker* would also apply the substantial evidence test, with less vigor, to the Comptroller's findings on competition.

Crocker, however, is distinguishable from the case at bar, and it is distinguishable on one fact. In *Crocker* the findings of the Comptroller were based on a public, evidentiary hearing which produced 1,605 pages of testimony and exhibits. There was no such hearing in the instant proceeding. Therefore, although the *Crocker* holding rules the instant case as a Court review of an agency decision, the question of scope of review comes under the rule of *First National Bank of Smithfield, North Carolina v. Saxon*, 352 F. 2d 267 (4 Cir. 1965).

Smithfield involved a branch bank approval under 12 U.S.C. Section 36 in which the Comptroller approved a new branch without a hearing. The Court first held that a hearing was not required because 12 U.S.C. Section 36 made no provision for one. A hearing is only required when expressly directed by the empowering statute. Then, after this determination, the Court declared that weight is only to be given to the Comptroller's decision if after a Court hearing in law and in fact it is found that his decision rested on an exercise of discretion. This is because the Court will not substitute its discretion for the Comptroller's.

This Court finds *Smithfield* to be analogous to the instant case. The BMA-66, like 12 U.S.C. Section 36, has no requirement for a hearing before the Comptroller, thus allowing the Comptroller to act at his discretion. However, when there is no hearing, it cannot be contended that the findings of the Comptroller should be given the weight of hearing based findings.

The basis for this conclusion is best seen in the following quote from *Smithfield*:

"We have said the Comptroller did not act arbitrarily in not allowing a hearing. However, a necessary consequence of his unilateral procedure is that the facts on which the Comptroller presumably acted should not be given the preferred position accorded by the substantial evidence rule. The rule would declare them indisputable if some reasonable basis for them may be found in the evidence. Applied here, the plaintiff would be bound by evidence offered in a proceeding in which it was not heard. Hence, there is no place in the review for an opening presumption of correctness of any fact which it may appear to the Court was adopted by the Comptroller for his decision.

The substantial evidence rule, therefore, may be invoked only when a proper foundation is laid for it as was done in *Crocker*.

Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside.

The other question requiring answer is how is the burden of proof to be allocated? However, this Court's decision that Justice's only action lies within the ambit of BMA-66 allows only one solution. The allocation is as follows:

Justice must prove a violation of BMA-66, Section 5(B). To show this violation, Justice has to prima facie establish (1) that there are anticompetitive effects, as defined in Section 5(B) and (2) that these anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Only such a showing will make out a case for violation of BMA-66. Proof of anticompetitive effects solely is no longer controlling. A merger may be anticompetitive and yet be legal because it promotes the public interest as set forth in the Act. Therefore, for Justice to show illegality, it must prove first that a merger is not only anticompetitive, but also prima facie that it is not in the public interest.

If and when Justice establishes such a prima facie violation of BMA-66, the burden of producing evidence will shift to the Banks and the Comptroller to counter the Justice Department's proof.

Once the Banks and Comptroller have presented their case, Justice will be given an opportunity to rebut such matters as are raised by the Banks and Comptroller in regard to the convenience and needs test. In any event, however, Justice has the overall burden of persuasion to show the illegality of the merger.

III

Opinion and Order of October 13, 1966

[CAPTION OMITTED]

CLARY, Chief Judge:

On December 6, 1965, the Central-Penn National Bank of Philadelphia and the Provident National Bank of Philadelphia applied to the office of the Comptroller of the Currency for permission to merge under the charter of the Central-Penn National Bank and with the title of Provident National Bank. The report by the Board of Governors of the Federal Reserve System to the Comptroller of the

Currency under Section 18(c) of the Federal Deposit Insurance Act on the competitive factors involved in the proposed merger dated January 7, 1966, was that "the overall effect of the proposed merger on competition would be significantly adverse." On the same day, the Attorney General of the United States reported, "There are strong reasons, therefore, for believing that the proposed merger would have an important adverse effect on competition within the Philadelphia banking market . . . the anti-competitive effects of this merger are important and considerable and there are likely to be no redeeming features." The Federal Deposit Insurance Corporation filed no comment.

On March 4, 1966, the Comptroller of the Currency approved the merger, and on March 31, 1966, filed his written decision in respect thereof. In that decision the Comptroller noted that this application to merge was the first filed by banks of significant size to be acted upon by his office since the passage of the 1966 Amendment to the Bank Merger Act. He stated, "The new law, passed by Congress to moderate the decisions of the Supreme Court in *U.S. v. Philadelphia National Bank, et al.*, 374 U.S. 321 (1963) and *U.S. v. Lexington*, 376 U.S. 665 (1964), recognizes that traditional antitrust concepts cannot be applied to banking without substantial modification." His findings then followed sustaining the merger.

On April 1, 1966, the present action brought by the United States of America against Provident National Bank and Central-Penn National Bank of Philadelphia, defendants, was filed to enjoin the merger. On April 7, 1966, James J. Saxon, Comptroller of the Currency, intervened and thus is a party to the action, as provided by Section 1828(c)(7)(D) of Title 12, United States Code. Since under the provisions of the afore-quoted Section 1828 of Title 12 a novel situation has been brought about wherein two departments of the Executive Branch of the Government are litigating one against the other, with the approval of the

Congress of the United States, it will be necessary to delineate in this Opinion to which branch of Government is being referred. Consequently, for the purposes of this Opinion, the plaintiff hereafter will be referred to as "Department of Justice" or "Justice"; the defendant Provident National Bank as "Provident"; the defendant Central-Penn National Bank of Philadelphia as "Central"; the joint defendants as "Banks"; the Comptroller of the Currency as "Comptroller" or "Intervenor", and the Bank Merger Act, Public Law 89-356, 64 Stat. 892, will be referred to as "BMA-66". The stated purpose of the aforesaid Act, as set forth in the slip sheet publication reads as follows:

To establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks, and for other purposes.

The pertinent pleadings to date which are essential to a decision on the present motions consist of a complaint filed by Justice, a joint answer filed by the Banks, the order permitting intervention of James J. Saxon, Comptroller of the Currency, answer of the Comptroller, motion of the Comptroller to dismiss, and motion of the Banks to dismiss. The basis for each of the motions to dismiss is that the complaint "fails to state a claim upon which relief can be granted."

There is no question that a law suit was started by Justice to enjoin the merger before the thirtieth calendar day after the date of approval by the agency (March 4, 1966). Thus, Justice has met the fundamental requirement of BMA-66, Title 12, Section (c)(7)(A), which prohibits any litigation challenging the merger after the thirtieth calendar day following approval. Justice has met the statutory limitation of action in that regard. A reading of the complaint leaves no doubt that Justice intended to plead, and did plead, a case of antitrust violation strictly in accordance with Section 7 of the Clayton Act (15 U.S.C., Section 18) and has attempted to ignore completely BMA-66. There

are too many pointed references in the complaint challenging all alleged violations of antitrust law as contravening Section 7 of the Clayton Act only. Justice bottoms its case on the decision of the Supreme Court in *U.S. v. Philadelphia National Bank, et al.*, 374 U.S. 321 (1963). It is this specific pleading of Justice charging a violation of Section 7 which is relied upon by the Banks and the intervening Comptroller in their motions to dismiss. The Banks and Comptroller insist that a Section 7 action is no longer available to Justice in a merger or consolidation of the type involved in the instant case, and that any actions must be grounded in BMA-66 and no other statute in the light of the wording of BMA-66. The Banks and Comptroller urge that since Justice has failed to ground its action in a challenge under BMA-66 within the thirty day period, and that since such failure is substantive rather than procedural, the limitations contained in BMA-66 are applicable, that the Court is thus without jurisdiction, and the action must be dismissed. In plain language they insist that Justice has deliberately sought to avoid any requirements contained in BMA-66 which deletes "line of commerce" and adds another facet to the standards governing bank mergers, i.e., if anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the agency in question is authorized to approve a proposed merger. This intransigence of Justice, they contend, is substantive, not procedural, and thus fatal to the position of Justice.

The weakness of the contentions of the Banks and of the Comptroller lies in the fact that we are now only at the notice pleading stage. The complaint specifically charges that the history of commercial banking in the four-county area of Philadelphia has been one of consolidations, mergers and acquisitions, with a heavy concentration of the business of commercial banking within a relatively few

banks; that Provident controlled 9% of the total assets, 9% of the total loans, 9% of the total PIC [sic] deposits, 10% of the total IPC demand deposits, and 9% of the banking offices doing business in the four-county area; that Central-Penn, the sixth largest commercial bank in the four-county area, controlled 5% of the total assets, 5% of the total loans, 5% of the total IPC deposits, 5% of the total IPC demand deposits, and 6% of the banking offices doing business in the four-county area; that Provident is the product of seven mergers or consolidations since 1947, and Central-Penn is the product of six such mergers or consolidations since 1949; that the proposed merged bank would be the fourth largest bank in the area, controlling 14% of the total assets, 14% of the total loans, 14% of the total IPC deposits, 15% of the total IPC demand deposits, and 15% of the banking offices of 36 banks doing business in the four-county area. Also, Justice contends that after the proposed merger, the five largest banks in the area would control 78% of the total assets, 79% of the total loans, 76% of the total IPC deposits, 77% of the total IPC demand deposits, and 63% of the banking offices of 36 banks doing business in the area; that it would destroy competition between each other and other banks, and that it would substantially lessen competition or tend to create a monopoly. It also charges that competition generally in the commercial banks in the four-county area will be substantially and unreasonably lessened, and that concentration in commercial banking in the four-county area will be substantially and unreasonably increased.

It cannot be gainsaid that if Justice had seen fit to plead generally and without reference to any particular statute, instead of specifically proceeding under Section 7 of the Clayton Act, and these factors pleaded might result in a violation of antitrust laws, the Court would of necessity have to hear the case. The only question for decision then is, does the reference solely to Section 7 invalidate the

cause of action filed by Justice? For reasons hereafter set forth, this Court decides that it does not.

The purpose of notice pleading is merely to inform opposing parties what such opposing parties have to meet and defend. Justice charges a violation of antitrust laws, despite its insistence upon Section 7. Thus, suit is brought under antitrust laws of the United States.

The reference to a statute as being the basic ground upon which an action is brought, even if completely incorrect, is no ground for the dismissal of an action where there is a statute in existence which would warrant a valid cause of action for which relief could be granted upon the facts as pleaded. *Missouri K & T.R. Co. v. Wulf*, 226 U.S. 570 (1913). This case involved a complaint based upon a state statute which had been repealed by the enactment of a federal statute not mentioned in the complaint. Mr. Justice Pitney, writing for the Court, held that the Court was presumed to be cognizant of the enactment and that the pleader was not required to refer to the federal act. He further stated that reference to the state statute no more vitiated the pleading than a reference to any other repealed statute would have done. It was only important that there were sufficient allegations to support an action under the new federal act.

The modern theory of notice pleading is one of even greater liberality, thus bolstering the decision reached in *Missouri K. & T. R. Co. v. Wulf*, *supra*. Today, the basic principle is that pleadings are no longer to be held to the rigid standards of the common law and neither absolute clarity nor absolute precision is required. *United States v. Crown Zellerbach Corporation*, 141 F. Supp. 118 (N.D. Ill. 1956). It is enough to sustain a pleading against a motion to dismiss that a defendant is informed with reasonable particularity of a legally cognizable claim against him. If the plaintiff could recover on any state of facts, which it might prove in support of its allegations as laid, a motion to dismiss will be denied. *Conley v. Gibson*, 355 U.S. 41 (1957); *Melo-Sonics Corporation v. Cropp*, 342 F. 2d 856.

(3 Cir. 1965); *Fuller v. Highway Truck Drivers & Helpers Local 107*, 233 F. Supp. 115 (E.D. Pa. 1964); *Miller v. Bargain City, U.S.A. Inc.*, 229 F. Supp. 33 (E.D. Pa. 1964).

Therefore, today the legal averments of a pleading are not so important as long as there are allegations which, if proved most favorably to plaintiff, would permit recovery under the laws of the United States. If, in such a complaint, there also appears a reference to an irrelevant statute, or if no statute is mentioned, the Court need only take judicial notice of the relevant statute. As stated in *Buell v. Sears, Roebuck & Co.*, 321 F. 2d 468 (10 Cir. 1963), it is not necessary to plead what may be judicially noticed. And, it is hornbook law that federal acts are a proper subject for judicial notice.

There is a further principle of pleading which has been recognized in federal procedure since *United States v. Morris*, 23 U.S. 246, 6 L. Ed. 314 (1825), that a subsequent pleading of an adversary, if not thereafter denied, may cure a defect in a prior pleading. *Cole v. Ralph*, 252 U.S. 286, 40 S. Ct. 321, 64 L. Ed. 567 (1920); *Albertson v. Federal Communications System*, 87 U.S. App. D.C. 39, 182 F. 2d 397 (1950); *Bullen v. DeBretteville*, 239 F. 2d 824 (1956). This principle applies to substantive as well as procedural omissions.

In the first defense of their answer, defendants claim that any action lies only under BMA-66. In their second defense, the defendant Banks put into controversy the question as to whether all right of Justice to enjoin the merger is vested in BMA-66. The answer of the Comptroller likewise puts into controversy the Bank Merger Act of 1966 by its prayer for relief.

We have long passed the stage peculiar to common law pleading that a failure in form of pleading vitiates the entire proceeding. This is an important case to all and is not a private quarrel between two branches of the Executive Department. The Congress of the United States has, for the first time, permitted two co-ordinate branches of

the same department of Government to litigate opposite views in a judicial proceeding, thus affording one department of the Executive Branch, aggrieved by an alleged arbitrary position of the Department of Justice, to properly present for the first time before the Judicial side of the Government its contention when it is in violent disagreement with the Department of Justice. While quite novel, in view of increasing differences between departments of Government, the provision is undoubtedly necessary.

In denying the motions to dismiss at this time, the Court does not sustain the position of Justice that it is entitled to sue under Section 7 of the Clayton Act. The only suit open to Justice to enjoin a bank merger lies solely within the ambit of BMA-66. It is not necessary at this time to decide the question of burden of proof, whether on Justice or on the Comptroller and Banks. That will be ruled upon in later pre-trial procedures.

ORDER

AND NOW, to wit, this 13th day of October, 1966, for the reasons set forth in the foregoing Opinion, it is ORDERED, ADJUDGED AND DECREED that defendants' Motion to Dismiss and intervenor's Motion to Dismiss be and they are hereby DENIED.

By the Court:

THOMAS J. CLARY,
Chief Judge.